

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1901.

No. 500

FRANK KIRKMAN, PLAINTIFF IN ERROR,

vs.
THE CITY OF PORTLAND, DEFENDANT.
ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON.

FILED FEBRUARY 11, 1902.

(32517)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 503.

FRANK KIERNAN, PLAINTIFF IN ERROR,

vs.

THE CITY OF PORTLAND, JOSEPH SIMON, MAYOR,
ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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* * * * *

1-9 And afterwards on the 21st day of February, 1910, there was filed in said office an Amended Complaint in words and figures as follows, to-wit:

10 In the Circuit Court of the State of Oregon for the County of Multnomah.

FRANK KIERNAN, Plaintiff,

vs.

THE CITY OF PORTLAND, a Municipal Corporation; JOSEPH SIMON, Mayor of City of Portland; A. L. Barbur, Auditor of City of Portland, and Joseph Buchtel, Defendants.

Amended Complaint.

Comes now the above named plaintiff for himself, and for all others similarly situated who wish to become parties to this suit and share in the expense thereof, and by leave of Court files his amended complaint, and for cause of suit against the above named defendants, complains and alleges:

I.

That the plaintiff is and during all the times herein mentioned has been a citizen of the City of Portland, County of Multnomah, State of Oregon, and the United States of America, and is the owner of a large amount of real and personal property in the City of Portland which is subject to tax for the payment of the obligations of the city of Portland, including any and all bonds which may be issued by the city of Portland, and which have to be paid out of the general resources of the city of Portland and money raised by taxation by the city of Portland.

II.

That the city of Portland is a duly organized and existing municipal corporation under the laws of the State of Oregon, and as such has only such power and authority to issue bonds of the city of Portland, and to levy taxes upon the property and inhabitants, situated within the city of Portland, as said city is specially and legally authorized to do by its said charter.

That the defendant, Joseph Simon, is the duly qualified, elected and acting Mayor of the city of Portland.

That the defendant A. L. Barbur is the duly elected, qualified and acting Auditor of the city of Portland.

III.

That at a regular council meeting of the Council of the city of Portland, held at the City Hall in the city of Portland, October 27,

1909, the Council for the city of Portland, without any lawful power or authority so to do, attempted to pass an Ordinance No. 20208, entitled: "An ordinance providing for the issuance and sale of bonds of the city of Portland, for the construction of a high bridge across the Willamette river, from a point at or near Broadway and Larrabee streets, on the East side of said river, and following the line of Broadway street extended westerly in its present course to a point at or near its intersection with Seventh street on the West side of said river, with its approaches, terminals and necessary accessories, approving the form of said bonds and the coupons to be attached and declaring an emergency," which said pretended Ordinance so pretended to be passed by the Council of the city of Portland on October 27, 1909, was pretended to be submitted to the defendant Mayor of the city of Portland on October 27, 1909, and said defendant Mayor on October 27, 1909, without any lawful power or authority so to do, pretended to approve the same, and the defendant A. L. Barbur, auditor of the city of Portland, pretends to have said document in his possession as a valid ordinance of the city of Portland, and to file the same and have it as a record ordinance of the city of Portland.

That by said pretended Ordinance No. 20208 mentioned above, the council of the city of Portland, without any right or authority under the law of the state of Oregon and the United States of America, or the Charter of the city of Portland, have pretended to pass an ordinance whereby said Council pretends to recite that by an act approved by the affirmative vote of the electors of the City
12 of Portland, at the general election held in said city on Monday the 7th day of June, 1909, the Executive Board of the city of Portland, County of Multnomah, and state of Oregon, and its successors in office, was authorized and empowered, in the name of the city, to construct a high bridge with appropriate approaches, terminals, piers, abutments and supports, from a point at or near the intersection of Broadway and Larrabee streets, on the East side of the Willamette river, and following the line of Broadway street, extended westerly in its present course, to a point at or near its intersection with Seventh street on the West side of said river, thence southerly and easterly to a point at or near the intersection of Sixth and Irving streets in said city (the West approach and incline of said Bridge being subject to modification and change by the Executive board, or its successors, of said city). And said Ordinance further pretends to recite that said Act authorizes and empowers the Council of the city of Portland, in the name of and under the corporate seal of the city, to provide a fund for the construction of said bridge, its approaches, terminals, piers, abutments and supports, and to issue and dispose of bonds of the city of Portland to an amount not exceeding Two Million of Dollars, of the denomination of \$500.00 or \$1000.00, as the Council might determine, with interest coupons attached thereto. And said council further pretends to recite in said Ordinance that said Act so authorizing said building of said bridge, and the issuance of said bonds, went into effect upon the proclamation of the Mayor of the city of Portland that the same had been passed by

an affirmative majority of all the votes cast thereon at said general election, which proclamation was signed by said Mayor on the 24th day of June, 1909, and filed in the office of the auditor of the city of Portland on said 24th day of June, 1909. And said Ordinance further pretends to declare that the Council of the city of Port-

13 land deems it expedient and necessary that said bonds to the amount of Two Hundred and Fifty Thousand (\$250,000)

Dollars be issued and sold, without delay, and then said council of the city of Portland pretends to pass an ordinance, authorizing and directing the issue of bonds for the city of Portland in the sum of two hundred and fifty thousand (\$250,000) Dollars, in denominations of \$1000.00 each, with interest coupons attached thereto, and that said bonds should be dated the 1st day of July 1909, and should be signed by the Mayor, and countersigned by the auditor — the city of Portland, whereby the city of Portland shall be held and considered, in substance and effect, to undertake and promise, in consideration of the premises, to pay to the bearer of each of said bonds, at the expiration of thirty years from the date thereof, the sum named therein, in gold coin of the United States of America, together with interest thereon at the rate of four (4%) per cent per annum, payable half-yearly, which bonds shall be known as the "Bridge Bonds of the city of Portland, Series 1909." And then said Ordinance pretends to set forth a form of said bridge bonds, and in said form of pretended bridge bonds of the city of Portland, the council of the city of Portland pretends to insert recitals of the authority of the city of Portland and of the council, to issue the said bonds, which said recitals are not true and if said bonds are allowed to be issued and sold to purchasers, at public sale, with said untrue recitals of fact as to the legality, regularity and authority to issue said bonds, and the protection of the contracts by the United States Constitution, would make binding obligations upon the city of Portland and its taxpayers solely by reason of said false recitals in said bonds, which false recitals are to the effect the city of Portland and its Council and Mayor and Auditor have lawful authority to issue said bonds, by virtue of and in full and strict accordance and compliance with all of the provisions of an amendment to the Charter of the city of Portland, entitled: "An Act to amend Article VI of Chapter III

14 of the charter of the city of Portland, entitled "An Act to incorporate the city of Portland, Multnomah County, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the Secretary of State January 23rd, 1903, by inserting a section in said Article VI of Chapter III after section 118 and before section 119 thereof, which shall be designated in the charter as section One Hundred and Eighteen and one-half (118½) of Article VI of Chapter III, "adopted by the electors of the city of Portland on the 7th day of June, 1909. And said Council of the city of Portland further falsely and wrongfully attempted to insert in said ordinance and form of bond a recital to the following effect: "And it is hereby certified and recited that all acts and things required to be done precedent to the issuance of these bonds, have been properly done and performed in

regular and due time, form and manner, as required by law, and that the total debt of the city of Portland, including these bonds, does not exceed the statutory nor constitutional limitation of indebtedness, and for the punctual payment at maturity of the principal and interest of this bond, the faith and credit of the city of Portland are hereby irrevocably pledged."

And said Ordinance further attempts to require and direct the Auditor of the city of Portland to advertise for proposals for the sale of said bonds.

Then said council further in said ordinance, in order to attempt to wrongfully prevent the exercising of the referendum upon said false and illegal ordinance and to prevent its being nullified by the taxpayers of the city of Portland, inserted an emergency clause in which said council wrongfully and falsely asserted the following:

"SECTION 5. Inasmuch as this Ordinance is necessary for the immediate preservation of the public health, peace and safety of the city of Portland and the inhabitants thereof in this:

15 "That said city has not at this time adequate facilities for crossing the Willamette river; that the travel and traffic across the present bridges over said river are congested and constitute a menace to life and property, wherefore an emergency is hereby declared and this ordinance shall go into force and effect from and after its approval by the Mayor."

That the Council of the city of Portland and the defendant mayor of the city of Portland, and the defendant Auditor of the city of Portland, together with a few citizens of the northeastern part of the city of Portland, who have real property in that vicinity, which they believe will be increased in value by the building of said bridge at the expense of the taxpayers of the city of Portland, have conspired together to claim and pretend that the city of Portland and its council, Mayor and Auditor, have power and authority to issue bonds for the building of said bridge, and to sell the same in the sum of Two Million Dollars, and to create thereby binding obligations upon the city of Portland and its taxpayers, and in pursuance of said conspiracy to place a large and illegal debt upon the city of Portland, and upon the property and taxpayers thereof, have attempted to pass said ordinance containing said false recitals, and are to attempt to advertise and sell said bonds to innocent purchasers, and are to attempt, by a friendly suit, to have the courts declare said bonds to be legal and binding upon the city of Portland, its property and taxpayers, and thereby, by means of this series of illegal acts to circumvent the law and to place a large burden upon the property of the people of the city of Portland by circumventing and evading the law, and the only way this illegal action can be stopped is for this court of equity to entertain this suit and upon the final hearing thereof enter permanent injunction enjoining the defendants and each of them from doing such illegal acts and creating this large debt upon the City of Portland and the property belonging to
16 the owners thereof and situated within said city by this unlawful means.

IV.

The defendants claim the right to do the said illegal acts by virtue of the following facts:

1st. The council of the city of Portland at its regular meeting, held at the City Hall of the city of Portland, March 31st, 1909, passed Ordinance No. 19174, entitled:

An Ordinance repealing the ordinance No. 18531, entitled: "An Ordinance calling a special election for the purpose of submitting to the electors of the city of Portland a proposed amendment to the charter of the city of Portland, entitled: 'An Act to amend Article VI of Chapter III, of the Charter of the city of Portland, entitled: "An Act to incorporate the city of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the Secretary of State January 23, 1903, by inserting a section in said Article VI of Chapter III after section 118 and before section 119 thereof, which shall be designated in the charter as Section One Hundred and Eighteen and one-half (118½) of Article VI of Chapter III," as amended, which said ordinance was submitted to the Mayor of the city of Portland April 3, 1909, and approved by the Mayor of the city of Portland, April 5, 1909, and which ordinance provided as follows:

SECTION 1. That Ordinance No. 18531, entitled: "An Ordinance calling a special election for the purpose of submitting to the electors of the city of Portland a proposed amendment to the Charter of the city of Portland, entitled, 'An Act amend Article VI of Chapter III of the Charter of the city of Portland, entitled, "An act to incorporate the city of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the Secretary of State January 23, 1903, by inserting a section in said Article VI of Chapter III after section 118 and before section 119 thereof, which shall be designated in the Charter as Section One Hundred and Eighteen and one-half (118½) of Article VI of Chapter III," as amended, be and the same is hereby repealed."

2nd. Then at said meeting on March 31, 1909, the council of the city of Portland passed the following resolution, which is set forth in the Journal of the council, pages 158 and 159, and is as follows:

17

Resolution.

Be it resolved by the council of the city of Portland that an act entitled, "An act to amend Article VI of Chapter III of the charter of the city of Portland, entitled, 'An act to incorporate the city of Portland, Multnomah county, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State January 23, 1903, and amended June 3, 1907, by inserting a section in said Article VI of Chapter III after Section 118 and before Section 119 thereof, which shall be designated in the Charter as Section one hun-

dred and eighteen and one-half (118½) of Article VI of Chapter III" authorizing the council of the city of Portland to issue and dispose of bonds of the city of Portland in an amount not exceeding two million dollars to be issued for the purpose of constructing a new bridge across the Willamette River from Broadway street on the east side of said river to a point at or near Sixth and Irving streets on the west side of said River, be and the same is hereby submitted to the legal voters of the city of Portland, at the city election to be held in the said city on the 7th day of June, 1909, for their adoption or rejection, and each elector who votes for such proposed amendment shall vote "Yes" or "No" in answer to the following question: "Shall Article VI of Chapter III of the charter of the city of Portland be amended by inserting therein between sections 118 and 119 Section one hundred and eighteen and one-half (118½), providing for the construction of a free bridge from a point on Broadway street on the east side of the Willamette river to a point at or near Sixth and Irving streets on the west side of said river?"

3rd. Then the city of Portland prepared and caused to be published in a pamphlet for distribution, with other proposed amendments to the charter, the following:

Broadway and Larrabee Street Bridge Bonds.

(Submitted by the Council of the City of Portland.)

AN Act to amend Article VI of Chapter III of the charter of the city of Portland, entitled "An act to incorporate the city of Portland, Multnomah county, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the Secretary of State January 23, 1903, by inserting a section in said Article VI of Chapter III, after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of Article VI of Chapter III.

Be it enacted by the people of the city of Portland, and the city of Portland does ordain as follows:

SECTION 1. That Article VI of Chapter III of the charter of the city of Portland, entitled "An act to incorporate the city of Portland, Multnomah county, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the Secretary of State, January 23, 1903, be and the same is hereby amended by inserting the following section in said Article VI of Chapter III, after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of Article VI of chapter III.

18. SECTION 118½. The council of the city of Portland is hereby authorized in the name of and under the corporate seal of said city to issue and dispose of bonds of said city of Portland to an amount not exceeding two million dollars, of the denominations

of five hundred dollars, or one thousand dollars, as the council may determine, and in such form as the said council shall select, with interest coupons attached thereto. The said bonds shall be signed by the Mayor and countersigned by the auditor of said city of Portland, and each of said coupons shall have the signatures of the Mayor and auditor of the city of Portland engraved thereon, whereby the city of Portland shall be held and considered in substance and effect to undertake and promise, in consideration of the premises, to pay to the bearer of each of said bonds, at the expiration of thirty years from the date thereof, the sum named therein in gold coin of the United States, together with interest thereon in like gold coin at the rate of four per centum per annum, payable half-yearly as provided in said coupons. The bonds issued in pursuance of the authority hereby granted shall be known as the "Bridge Bonds of the city of Portland, series 1909." The bonds herein provided for and authorized to be issued, shall be advertised and sold to the highest responsible bidder. The council may, at its discretion, reject any and all bids tendered for such bonds and proceed to readvertize the same when the bids are not satisfactory. The treasurer of the city of Portland, Oregon, shall have the care and custody of all moneys received from the sale of said bonds, or otherwise, and shall pay out the same on warrants of the Mayor countersigned by the auditor, and not otherwise. All expenses connected with the purchase or condemnation of any property, easement, franchise, or rights, and the expense of the bonds issued as herein authorized, and the cost of the bridge herein provided for, with its approaches, terminals and necessary accessories, are to be paid out of the proceeds of the sale of said bonds.

From the fund herein provided for, the Executive board of the city of Portland, Multnomah county, state of Oregon, and its successors in office, is hereby authorized and empowered, in the name of the city of Portland, to construct and build a bridge, with appropriate approaches and terminals, and with a clearance of not less than 65 feet above high water and not less than 96.12 feet above the city datum or low water mark, across the Willamette river in said city, from Broadway street at or near its intersection with Larabee street, on the east side of said river, and following the line of Broadway street, extended westerly in its present course, to a point at or near its intersection with Seventh street on the west side of said Willamette river; thence southerly and easterly to a point at or near the intersection of Sixth and Irving streets; and it shall have full power and authority, subject to such regulations as may be imposed by the United States, to build, erect and construct piers, abutments and other necessary supports in the bed of the Willamette river for the foundation of such bridge.

The location of the west approach and incline of said bridge shall be subject, however, to such modification and change as may be deemed expedient by said Executive board or its successors in office.

The said executive board, or its successors in office, for the purpose of carrying into effect the provisions of this section, is hereby authorized and empowered to appropriate and condemn in the name

of the city of Portland, for the public use, any property occupied by or abutting upon said streets, bridge site, approaches, or terminals, or necessary, or which may be required, for the construction or maintenance of said bridge, approaches or terminals, including all franchises, easements, liens, approaches, structures, super-
19 structures, leases, railroad tracks, and railroad property, railway wires, rights of way, roadways, telephone, telegraph and electric light wires, which said Executive board, or its successors, may require to carry into effect the purpose of this section, and such property may be entered upon and examined, surveyed, selected, condemned and appropriated in the mode provided by the charter of the city of Portland, or by the statutes of the state of Oregon, for the appropriation of property for public use or corporate purposes. And for the purpose of carrying the provisions of this section into effect, the executive board of the city of Portland, or its successors in office, is authorized and empowered to appropriate and use the whole or any part of any of the public streets or highways of the city of Portland or to establish or alter the grades thereof. All railway tracks laid upon said bridge, or upon its approaches or terminals, shall forever be and remain the exclusive property of the city of Portland, and no exclusive privilege or franchise shall be granted to any person, railway company, or other public service corporation, for the use of the whole or any part of such bridge, approaches or terminals. And all of such privileges or franchises that may be granted by the city of Portland for the use of the whole, or any part of such bridge, approaches, or terminals, shall be granted upon such compensation to the city as may be determined by the council of the city of Portland or its successors in office. After the construction of such bridge, the Executive board, or its successors in office, shall surrender and deliver the possession of the same to the county court of Multnomah county, state of Oregon, and such court shall operate, control and manage the same and keep the same in repair in the same manner as other bridges, crossing the Willamette river within the city of Portland, are operated, controlled and managed as required by law.

All acts and parts of acts in conflict herewith are hereby repealed to the extent that they may conflict with the provisions hereof.

Resolution.

Be it resolved, by the council of the city of Portland, that an act entitled "An Act to amend Article VI of Chapter III of the charter of the city of Portland, entitled 'An act to incorporate the city of Portland, Multnomah county, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of state, January 23, 1903, and amended June 3, 1907, by inserting a section in said Article VI of Chapter III, after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of article VI of chapter III," authorizing the city council of the city of Portland to issue

and dispose of bonds of the city of Portland in an amount not exceeding two million dollars, to be used for the purpose of constructing a new bridge across the Willamette river, from Broadway street on the east side of said river to a point at or near Sixth and Irving streets on the west side of the Willamette river, be and the same is hereby submitted to the legal voters of the city of Portland at the city election to be held in said city on the 7th day of June, 1909, for their adoption or rejection, and each elector who votes

20 for such proposed amendment: shall vote "Yes" or "No" in answer to the following question: "Shall Article VI of chapter III of the charter of the city of Portland be amended by inserting therein between sections 118 and 119, section one hundred and eighteen and one-half ($118\frac{1}{2}$) providing for the construction of a free bridge from a point on Broadway street on the east side of the Willamette river to a point at or near Sixth and Irving streets on the west side of said river."

Adopted by the council March 31, 1909.

A. L. BARBUR,

Auditor of the City of Portland,

By W. D. SMITH, *Deputy.*

Ballot Title.

Two million dollars bridge bonds to be authorized to construct a high bridge across Willamette river, from Broadway and Larrabee streets on the east side, following the line of Broadway street extended westerly in its present course to a point at or near its intersection with Seventh street on the west side, by an amendment to Article VI, chapter III of the charter of the city of Portland, by inserting therein a new section to be known as section $118\frac{1}{2}$.

Shall Article VI, chapter III, of the charter of the city of Portland be amended by inserting section $118\frac{1}{2}$?

152. No.

153. Yes.

4th. Then the city caused to be published in the Daily Abstract said same statements as it caused to be published in said pamphlet, and which are set forth above in said paragraph 3, said proposed amendments being published in the Abstract May 15 and 17, 1909.

5th. That at the election held June 7, 1909, there was printed on the ballot only the following for the information of the voter, in regard to this proposition, to-wit:

Two million dollars bridge bonds to be authorized to construct a high bridge across Willamette river from Broadway and Larrabee streets on the east side, following the line of Broadway street extended westerly in its present course to a point at or near its intersection with Seventh street on the west side, by an amendment to Article VI, Chapter III, of the charter of the city of Portland, by inserting therein a new section to be known as section $118\frac{1}{2}$.

Shall Article VI, Chapter III, of the charter of the city of Portland be amended by inserting Section $118\frac{1}{2}$?

152. Yes.

153. No.

21 At said election a large number of persons were to be voted for as candidates for office, and a large number of other measures were to be voted upon. The entire ballot, presenting the men and measures to be voted for or against at said election, for the information of said voters at said election, for the exercise of said powers as voters in the city of Portland at said election, was as is set forth in the sample ballot, a copy of which is hereto annexed and made a part of this amended complaint, as Exhibit A.

At said election 10,078 votes were cast "152 Yes" upon said ballots, and thus voted in favor of what is set forth in said ballot title, and —,061 votes were cast "153 No" upon said ballots, and thus voted against what is set forth in said ballot title at said city election.

At said city election there was a total vote cast of 17,935 votes, and there were 33,041 duly registered voters in said city at the time of said election.

And on June 24, 1909, the Mayor of the city of Portland issued a proclamation, as follows:

Proclamation of the Mayor of the City of Portland.

I, Harry Lane, Mayor of the city of Portland, hereby certify that a certain act entitled, "An Act to amend Article VI of Chapter III of the charter of the city of Portland, entitled 'An act to incorporate the city of Portland, Multnomah county, State of Oregon, to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State, January 23, 1903, by inserting a section in said Article VI of Chapter III after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of Article VI of chapter III," and having the following ballot title, to-wit: "Two million dollars bridge bonds to be authorized to construct a high bridge across Willamette river from Broadway and Larrabee streets on the east side, following the line of Broadway street extended westerly in its present course to a point at or near its intersection with Seventh Street on the west side, by an amendment to Article VI, Chapter III of the charter of the city of Portland, by inserting therein a new section to be known as section 118½", which was submitted to the legal voters of the said city at the election therein held on the first Monday in June, 1909, for their adoption or rejection, received the affirmative majority of the total number of votes cast thereon at said election, viz, 10078 votes for said act and 6,061 votes against said act; and I accordingly hereby make proclamation of the adoption of said amendment to the charter of the city of Portland, in accordance with the provisions of Ordinance

22 No. 16311 of the city of Portland, as amended.

Done at the city of Portland the 24th day of June, A. D. 1909.

HARRY LANE, *Mayor.*

Form approved:

J. P. KAVANAUGH,

City Attorney.

V.

Each of said things set forth above as done by the city of Portland for the purpose of attempting to amend the charter of the city of Portland are illegal and fail to amend the charter of the city of Portland by reason of the following facts:

The charter of the city of Portland, article V, sections 75 to 92 inclusive, provides the mode and manner in which the city shall proceed to acquire public utilities, which require the issuance of bonds to pay therefor, and said provisions expressly define a bridge as a public utility, and a bridge across the river in the city of Portland is a public utility, within the meaning of said provisions of said charter and could be acquired and built by the city of Portland complying with said provisions of said charter.

A rep-ition was filed April 7, 1908, containing sufficient signatures to comply with said provisions of the charter, requesting the city to acquire a public utility by building a bridge across the Willamette river from Broadway street in East Portland to the west side of the river, and an attempt was made to obtain authority for the city of Portland to build said bridge across said Willamette river by means of complying with said sections of the charter, 75 to 92 inclusive, and in pursuance thereof the city of Portland took certain steps to obtain plans and specifications for the building of said bridge. On May 8, 1908, the auditor of the city of Portland sent a letter to the Mayor

23 of the city of Portland, notifying him of the filing of said petition, and requesting the Mayor to comply with his duties under the charter in that regard.

On October 20, 1908, there was a petition for said bridge, containing sufficient signatures to comply with said provisions of the charter, presented at a legally called special council meeting of October 20, 1908, and the council requested the opinion of the City Attorney as to the validity of said petition.

On October 27, 1908, the city attorney of the city of Portland filed a written opinion with the auditor of the city of Portland, approving the validity of said petition, and stating the necessary plan of procedure to acquire said bridge as a public utility.

At a regular meeting of the council of the city of Portland, held at the city hall, in the city of Portland, November 11, 1908, the following ordinance was passed by council for the city of Portland, and was submitted to the Mayor of the city of Portland November 12th, 1908, and not being approved by him or returned with his reasons for not approving it within ten days thereafter, became a law as if said Mayor had approved said ordinance by reason of the provisions of Section 50 of the charter of the city of Portland, and said ordinance is as follows:

Ordinance No. 18531.

An ordinance calling a special election for the purpose of submitting to the electors of the city of Portland a proposed amendment to the charter of the city of Portland, entitled "An act to amend Article VI of Chapter III of the charter of the city of Portland, entitled 'An act to incorporate the city of Portland, Multnomah county, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State January 23, 1903, by inserting a section in said Article VI of Chapter III after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of Article VI of Chapter III."

The City of Portland does ordain as follows:

SECTION 1. That a special city election in the city of Portland be and the same is hereby called for Friday, the 23rd day of April, 1909, (the same being the date of the next city primary election and the forty-fifth day preceding the next general city election on the 7th day of June, 1909) for the purpose of submitting to the electors of said city, for adoption or rejection, an amendment to the charter of the city of Portland, entitled "An act to amend Article VI of Chapter III of the charter of the city of Portland, entitled 'An Act to incorporate the city of Portland, Multnomah County, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the secretary of State January 23, 1903, by inserting a section in said Article VI of Chapter III, after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of Article VI of Chapter III," which amendment provides for the construction of a bridge across the Willamette river from Broadway street, on the east side of said river, to a point at or near Sixth and Irving streets, on the west side of said river, and authorizing the issue and disposal of municipal bonds in a sum not exceeding two million dollars, to provide for the cost of the same.

SECTION 2. That the auditor of the city of Portland be and he is hereby directed to give notice of said election, in the manner prescribed by the charter.

On November 25, 1908, at a regular council meeting of the council of the city of Portland, the council of the city of Portland passed the following resolution, submitting an amendment to the charter of the city of Portland to the people of the city of Portland at a special election called on April 23, 1909, and said resolution is as follows:

Resolution.

Be it resolved by the council of the city of Portland, that an act entitled "An act to amend Article VI of Chapter III of the charter

of the city of Portland entitled 'An Act to incorporate the city of Portland, Multnomah county, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State, January 23, 1903, by inserting a section in said Article VI Chapter III after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of Article VI of Chapter III," authorizing the city council of the city of Portland to issue and dispose of bonds of said city in an amount not exceeding Two million dollars, to be used for the purpose of constructing a new bridge from Broadway street on the east side of the Willamette river, to a point on or near Sixth and Irving streets on the west side of the Willamette river, be and the same is hereby submitted to the legal voters of the city of Portland, at the city election to be held on the 23rd day of April, 1909, for their adoption or rejection, and each elector who votes for such proposed amendment shall vote "Yes" or "No" in answer to the following question:

25 "Shall Article VI of Chapter III of the charter of the city of Portland be amended by inserting therein between sections 118 and 119, section one hundred and eighteen and one-half (118½) providing for the construction of a free bridge from a point on Broadway street on the east side of the river to a point at or near Sixth and Irving Streets on the west side of said river.

At the regular meeting of the council of the city of Portland, held at the city hall of the city of Portland February 17, 1909, the council of the city of Portland duly passed the following ordinance, and the same was submitted to the Mayor of the city of Portland for his approval on February 17, 1909, and on February 23, 1909, the Mayor of the city of Portland approved said ordinance and the same is as follows:

Ordinance No. 18976.

An ordinance to amend section 1 of ordinance No. 18531, entitled "An ordinance calling a special election for the purpose of submitting to the electors of the city of Portland a proposed amendment to the charter of the city of Portland, entitled 'An act to amend Article VI of Chapter III of the charter of the city of Portland, entitled 'An act to incorporate the city of Portland, Multnomah county, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State January 23, 1903, by inserting a section in said Article VI of Chapter III after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of Article VI of Chapter III.'"

The city of Portland does ordain as follows:

SECTION 1. That section 1, of Ordinance No. 18531, entitled: "An ordinance calling a special election for the purpose of submit-

ting to the electors of the city of Portland a proposed amendment to the charter of the city of Portland, entitled, 'An act to amend article VI of Chapter III of the charter of the city of Portland, entitled, 'An act to incorporate the city of Portland, Multnomah county, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State, January 23, 1903, by inserting a section in said article VI of chapter III, after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of Article VI of chapter III,' be and the same is hereby amended to read as follows:

SECTION 1. That a special election in the city of Portland be and the same is hereby called for Saturday the 8th day of May, 1909, for the purpose of submitting to the electors of said city, for adoption or rejection, an amendment to the charter of the city of Portland, entitled: "An Act to amend article VI of chapter III, of the charter of the city of Portland, entitled: "An act to incorporate the city of Portland, Multnomah county, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith, filed in the office of the Secretary of State January 23, 1903, by inserting a section in said article VI of chapter III, after section 118 and before section 119 thereof, which shall be designated in the charter as section One hundred and eighteen and one-half (118½) of article VI of chapter III," which amendment provides for the construction of a bridge across the Willamette river from Broadway street, on the east side of said river, to a point at or near Sixth and Irving streets on the west side of said river, and authorizing the issue and disposal of municipal bonds in a sum not exceeding two million dollars to provide for the cost of the same.

SECTION 2. Whereas there is an immediate necessity that this ordinance shall take effect upon its approval by the Mayor, an emergency is hereby declared, and said ordinance is hereby declared to be necessary for the immediate preservation of the health, peace and safety of the people of the city of Portland, for the following reasons: That it is necessary to present the said amendment to the people for adoption or rejection before the next general election in said city, and for the further reason that there is an actual necessity for the erection of the bridge at said place. Therefore this ordinance shall take effect and be in force immediately upon its approval by the Mayor.

At the regular council meeting held in the city hall of the city of Portland on March 31st, 1909, the council for the city of Portland passed the following ordinance, and the same was submitted to the Mayor of the city of Portland for his approval on April 3, 1909, and said ordinance was approved by the mayor of the city of Portland April 15, 1909, and is as follows:

Ordinance No. 19174.

An ordinance repealing ordinance No. 18531, entitled "An ordinance calling a special election for the purpose of submitting to the electors of the city of Portland a proposed amendment to the charter of the city of Portland, entitled 'An act to amend Article VI of Chapter III of the charter of the city of Portland, entitled "An act to incorporate the city of Portland, Multnomah county, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the Secretary of State January 23, 1903, by inserting a section in said Article VI of Chapter III after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of Article VI of Chapter III," as amended.

The city of Portland does ordain as follows:

SECTION 1. That ordinance No. 18531, entitled, "An ordinance calling a special election for the purpose of submitting to the electors of the city of Portland a proposed amendment to the charter of the city of Portland, entitled, 'An act to amend Article VI of chapter III of the charter of the city of Portland, entitled, "An act to incorporate the city of Portland, Multnomah county, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the Secretary of State, January 23, 1903, by inserting a section in said article VI of chapter III, after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of Article VI of chapter III," as amended, be and the same is hereby repealed.

Ordinance No. 18976, providing for a special election in the city of Portland for Saturday, the 8th day of May, 1909, for the purpose of submitting to the electors of said city, for adoption or rejection, an amendment to the charter of the city of Portland, entitled, "An act to amend article VI of chapter III, of the charter of the city of Portland, entitled, 'An act to incorporate the city of Portland, Multnomah county, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith' filed in the office of the secretary of state January 23, 1903, by inserting a section in said article VI of chapter III, after section 118 and before section 119 thereof, which shall be designated in the charter as section one hundred and eighteen and one-half (118½) of article V of chapter III, which amendment provides for the construction of a bridge across Willamette river, from Broadway street on the east side of said river to a point at or near Sixth and Irving streets on the west side of said river, and authorizing the issue and disposal of municipal bonds in a sum not exceeding two million dollars to provide for the cost of same" has never been repealed and

was in full force and effect, and said election was not held on May 8th, 1909, and said Act was not adopted at said time, and by reason of said acts and proceedings on the part of the city of Portland, set forth above, the only time and place where said act, for the construction of said bridge and the issuance of said bonds, which the defendants claim to be a part of the charter of the city of Portland,

28 could have been submitted to the voters of the city of Portland for adoption or rejection, was on said 8th day of May, 1909, and said act not having been voted upon at said time and place, and not having been adopted at said time and place, is not a part of the charter of the city of Portland, and there is no authority of the city of Portland for attempting to build said bridge, and for the issuance of said bonds.

As said city of Portland was doing the acts set forth above, and passed the ordinances set forth above, and was attempting to build and acquire said bridge as a public utility under sections 75 to 92 inclusive, of the charter of the city of Portland, it was not within the power of the city of Portland to adopt the resolution, attempted to be adopted, on March 31, 1909, attempting to amend the charter, as attempted to be set forth in said resolution of March 31, 1909, and said resolution is set forth above.

The resolution passed November 25, 1908, for a special election to be held April 23, 1909, to determine whether the electors of the city of Portland would adopt said act or not was never repealed, but remains in full force and effect, and there was no election held in the city of Portland on April 23rd, 1909, and said amendment was not adopted April 23rd, 1909, and as said resolution was passed and in full force and effect, it was not within the power of the council of the city of Portland on March 31, 1909, to adopt the resolution attempted to be passed on March 31, 1909, and provide for the submitting to the voters of the city of Portland on June 7, 1909, for a vote of the question mentioned in the resolution of March 31, 1909, as there was a valid resolution in full force and effect, being said ordinance No. 18976, calling for an election upon a similar subject on May 8, 1909, and the power of the council of the city of Portland to order elections on said subjects was exhausted, and the acts of the council of the city of Portland, and the other officers of the city of Portland in attempting to submit any question in regard to the construction of this bridge and voting bonds therefor, to a vote

of the electors of the city of Portland on June 7, 1909, is in violation of law of the state of Oregon and the city of Portland, governing the mode and manner of amending charters of municipalities in the state of Oregon.

29 Ordinance No. 19174, passed by council of the city of Portland on March 31, 1909, did not clear the way so that the council of the city of Portland could pass the resolution it attempted to pass on March 31, 1909, and attempt to provide for a vote upon a question of constructing the Broadway bridge, and issue bonds to be submitted to the voters of Portland on June 7, 1909, which resolution is set forth above, for the reason that said ordinance No. 19174, set forth above, in addition to failing to repeal the prior resolutions and

ordinances, set forth above in this complaint, did not go into effect until thirty days after March 31, 1909, because of initiative and referendum provisions of the constitution of the state of Oregon, and the laws of Oregon for 1907, page 40, section 11, and said ordinances Nos. 18531 and 18976, and the resolution of November 25, 1908, in regard to elections being held to pass upon said acts, were each and all in full force and effect on March 31, 1909, and the power of the council was thus exercised and exhausted upon this subject upon March 31, 1909, and rendered it impossible for the council of the city of Portland on March 31, 1909, to pass the resolution which it attempted to pass on March 31, 1909, attempting to provide for submitting a question about the construction of Broadway Bridge to the voters of the city of Portland, on June 7, 1909, and its attempt to do so is illegal and void, for the reasons set forth above.

VI.

If the court holds that the council of the city of Portland on March 31, 1909, at its regular meeting had jurisdiction and power to pass a resolution, to submit an amendment to the charter of the city of Portland to the electors at the election to be held June 7, 1909, in regard to building a bridge and issue bonds to be used for the purpose of constructing a new bridge across the Willamette river, from Broadway street on the east side of said river to a point
30 at or near Sixth and Irving streets on the west side of said river, as was attempted to be done by the council of the city of Portland in said resolution, adopted March 31, 1909, by the council of the city of Portland, then plaintiff alleges that the city of Portland and its officers proceeded in such manner and form that what was done was illegal and in violation of law and null and void for the following reasons.

Laws of Oregon 1907, page 407, section 12, and ordinance No. 16311, "Entitled an ordinance to provide for carrying into effect in the city of Portland, initiative and referendum power, reserved to the legal voters of municipalities by section 1-A, of Article IV of the constitution of the state of Oregon, and to enact and amend their municipal charters, reserved to the legal voters, and cities and towns, by section 2 of article II of the constitution of the state of Oregon, and providing penalty for the violation of this Act," which ordinance was passed by the council of the city of Portland March 21, 1907, and submitted to the mayor of the city of Portland March 22, 1907, and approved by the Mayor of the said city March 26, 1907, and which statute and ordinance provide that an amendment to the charter of the city of Portland may be proposed and submitted to the legal voters of the city by resolution of the council without an initiative petition, but the same shall be filed with the Auditor for submission not later than sixty days before the election at which it is to be voted upon, and no amendment of the charter should be effected until it is approved by a majority of the votes cast thereon by the legal voters of the city. There never was any act or amendment to the charter of the city of Portland such as is described in the

resolution of March 31, 1909, to be proposed and submitted to the legal voters of the city by resolution of the council without an initiative petition, and no such document is in existence, and no such document was ever filed with the Auditor of the city of Portland for submission to the voters not later than sixty days before the election at which it is to be voted upon, to-wit: The election of June 7, 1909, nor at any time or at all. The so-called Act or

Amendment to the charter which is claimed by defendants to have been adopted as a part of the charter of the city of Portland is the Act which was proposed in ordinance No. 18531 to have been voted upon at the special election to have been held on April 23, 1909, and the amendment which was to have been voted at the election of April 23, 1909, by virtue of the resolution passed November 25, 1908, and there was never any election held on April 23, 1909, or at any time, to vote upon said proposed act or amendment and the same was never adopted.

The resolution adopted on March 31, 1909, describes the purpose of constructing a new bridge across the Willamette river from different points than the act describes which is mentioned in resolution passed November 25, 1908, and said resolution of March 31, 1909, utterly fails to describe a bridge or structure such as described in said Act mentioned in the resolution of November 25, 1908; and the act claimed to have been adopted as part of said charter of Portland. The resolution of March 31, 1909, is so indefinite as to be invalid and void as a resolution to submit any act or amendment as an amendment to the charter of the city of Portland under the law governing the amending of the charter of the city of Portland. Said resolution does not contain the act attempted to be proposed as an amendment so as to identify it, nor was said act filed with the auditor, for submission to the voters of Portland, so as to be identified as the Act mentioned in said resolution of March 31, 1909, nor was there any such Act as is mentioned in said resolution of March 31, 1909, in existence.

The resolution of March 31, 1909, is insufficient and void as a resolution, attempting to submit a proposed amendment to the charter of the city of Portland for the reason that said resolution fails to reasonably define and describe and set out what bridge or structure is to be authorized to be built by the pretended proposed act, and the cost thereof, and which amendment it pretends to submit to the voters of the city of Portland for adoption. Said resolution fails to describe the location, size or kind of bridge, or the point where said bridge is to start on Broadway street, the material from which it is to be constructed, or its width, or its height, or its cost, but undertakes to submit a mere amendment to allow the construction of a new bridge to cross the Willamette river from Broadway street on the east side of said river, to a point at or near Sixth and Irving streets on the west side of said river, at a cost not exceeding two million dollars, and such a description of the proposed structure in the resolution attempting to submit the same is so indefinite as to render the resolution and entire proceeding illegal and void, because the voters are not allowed to know and

pass upon what is proposed to be done or authorized, but an attempt is made to get the voters to delegate indefinite power to indefinite persons, and that is illegal and void.

The auditor did not publish said proposed charter amendment with the ballot title and number mentioned in said resolution of March 31, 1909, in full in the city official newspaper for two consecutive publications thereof, not later than twenty days before the election at which said amendment is to be voted upon, or at all, and there was no further charter amendment in existence as mentioned in said resolution of March 31, 1909, to be published. Instead, the auditor of the city of Portland attempted to publish in the Daily Abstract, which is designated as the City Official Newspaper, in its insertion of May 15 and 17, 1909, the charter amendment proposed to have been voted upon April 23, 1909, by said resolution of November 25, 1908, and which mentions a different structure and location from that mentioned in the resolution of March 31, 1909, and which is set forth as the ballot title and number above in this amended complaint, page 11. This was the only attempt to give notice by publication in the official newspaper of the amendment sought to be voted upon, and such notice was incorrect, misleading, illegal and rendered the attempted vote at the election a nullity.

The Ballot Title prepared to go on the ballot and which was inserted upon the Ballot of the election of June 7, 1909, is as set forth in Section 5th, page 11 of this amended complaint.

33 It undertakes to have the voters vote for a different structure from that mentioned in the resolution of March 31, 1909, to-wit: a high bridge instead of a new bridge, and provides for a high bridge across the Willamette river from Broadway and Larrabee streets on the east side following the line of Broadway street extended westerly in its present course to a point at or near its intersection with Seventh street on the west side by an amendment to Article VI of chapter III of the charter of the city of Portland, by inserting therein a new section to be known as Section 118½, instead of describing what is described in the resolution of March 31, 1909, to-wit: A new bridge across the Willamette river from Broadway street on the east side of said river to a point at or near Sixth and Irving streets on the west side of said river, and there is a very great and material difference between what is mentioned in the resolution of March 31, 1909, and what is mentioned to be voted upon in the Ballot title, and in the notice that was attempted to be published whereby the law governing the mode and manner of submitting charter amendments to the electors of the city for adoption or rejection, has been violated and the election attempted to be held June 7, 1909, thereon and the vote thereon was, by reason of these acts and omissions, illegal and void.

The ballot title set forth above and the ballott used upon said election of June 7, 1909, and which is made a part hereof as Exhibit A, were both in violation of law and illegal for the reason that said resolution of March 31, 1909, attempting to submit said pretended Act to the electors of the city of Portland, provides as a mandatory requirement for said election upon said question that

each electors who votes for such proposed amendment shall vote "Yes" or "No" in answer to the following question: "Shall Article VI of chapter III of the charter of the city of Portland be amended by inserting therein between sections 118 and 119 section one hundred and eighteen and one-half ($118\frac{1}{2}$), providing for the construction of a free bridge from a point of Broadway street on the east

side of the Willamette river to a point at or near Sixth and Irving streets on the west side of said river," and said ballot title does not contain said question so required to be contained therein by said resolution of March 31, 1901, and upon the official ballots used at said election of June 7, 1909, said question so required to be voted upon by the voters, was not inserted on said official ballots, and said voters did not vote upon said question, and there was a failure to comply with said resolution of March 31, 1909, and a failure to vote upon the question and proposition attempted to be submitted to the voters by the resolution of March 31, 1909, and for this reason and because of these facts there was no election held in accordance with said resolution of March 31, 1909, and there was no vote taken in accordance with said resolution of March 31, 1909, upon the act mentioned in said resolution of March 31, 1909, upon the act mentioned in said resolution of March 31, 1909, and the acts of the defendants in claiming there was any section $118\frac{1}{2}$ adopted as part of charter of Portland, are illegal and void, and the charter of Portland has not been amended by adding any section $118\frac{1}{2}$ thereto.

Said ordinance No. 16311 mentioned above, section VI thereof provides as a condition precedent to a valid election for the adoption of an amendment to the charter of the city of Portland, that it shall be the duty of the auditor of the city to print said ballot titles and numbers upon the official ballot. Charter amendments submitted by the council without initiative petitions shall be designated "Charter amendments submitted to the voters by the council" and in violation of said provisions of law, the auditor did not print on the official ballot used in said election anywhere what was required by said ordinance to wit: "Charter amendments submitted to the voters by the council" nor anything equivalent thereto. Said mandatory provision required to be upon the official ballots at said election of June 7, 1909, for the adoption of charter amendment submitted by the council without initiative petition, was entirely omitted, and by reason thereof one of the mandatory steps required

by the law for valid submission of charter amendments by the council, was omitted, and notice and opportunity to vote thereon as required by law, was denied and by reason thereof said election was illegal and a nullity, and the so-called amendment was not legally adopted and is not a part of the charter of the city of Portland.

Neither did said auditor in publishing said resolution, ballot title, and said pretended Act in the city official newspaper print therein that said pretended Act was a "Charter amendment submitted to the voters by the council."

Said ordinance No. 16311, mentioned above, sections 6 and 1

thereof, provides as a condition precedent to a *vail* election for the adoption of an amendment to the charter of the city of Portland, as follows:

"The auditor of the city of Portland shall number such measures and ballot titles in the most convenient and consecutive manner. The affirmative of the first measure shall be numbered 100, and the negative 101 in numerals, and the succeeding measures shall be numbered 102, 103, 104, 104, and so on."

"The auditor shall publish such proposed charter amendment with the ballot title and number in full in the City official newspaper for two consecutive publications thereof, not later than twenty days before the election at which such amendment is to be voted upon."

Said mandatory provision as to notice by publishing the number in the City Official newspaper was not complied with, but the opposite was published, and the number was published "152 No" and "153 Yes," instead of "152 Yes" and "153 No," and thereby the notice published was not given as provided by law, and the election as to such amendment is illegal.

The voters were misled by said published notice so that the voters who wished to vote against said measure were informed by the notice published to vote Number 152 X, and when the voters received the ballot, and voted Number 152 X, their votes were illegally and erroneously recorded in favor of the amendment, instead of against the amendment.

36

The designation of various measures by number is a method used by the law and the voters to inform the voters which way they desire to vote before the day of election, so that when the voters come to the election booth, on the day of election, they are in a hurry to vote, and receive the ballots, with candidates and propositions numbered, so that ballots can be marked hastily by the numbers, and voted in accordance with the published numbers and published notice, and thereby the voters vote their wishes speedily. The voters rely upon the published numbers as the means to identify the measures to be voted for or against, as the ballots are too long to be read carefully at the time of voting on election day, and on election day the voters have no time to detect errors in the numbers. By means of publishing the numbers one way in the pamphlets and city official newspaper, notices of the election on this proposed Charter amendment, and said numbers being published just the opposite way on the ballots, the voters who were opposed to the Broadway bridge were misled and large numbers of the voters who were opposed to this amendment voted on the ballots number "152 X", and thereby in accordance with the official notice voting "No" on this proposition, but their votes were illegally and incorrectly counted "yes" on this proposition, by reason of the way the ballots were printed, and in fact the voters of the city of Portland were and are opposed to this charter amendment, and if said charter amendment had been correctly numbered upon notices of election and ballots, so the voters would have voted by means of the identifying numbers, and thus voted their desires, the vote would have been cast "152 No", by a large majority of those voting in accordance

with the published notice, and their convictions upon this question, and not "152 Yes" as on the ballots, and in opposition to the will and real vote of the majority of the voters who voted upon this proposition. This proposition has been erroneously declared carried when it was defeated. By reason of the numbers being published as they were published, and the ballot numbers upon the ballot

37 being published as they were published upon this proposition, one of the mandatory steps required by the law for valid submission of charter amendments by the council was omitted, notice of election and opportunity to vote thereon as required by law was denied, and the voters were misled and the ballots, as marked, do not express the real will, intent and decision of the voters of Portland upon said proposition, but the reverse of their said will, intent and decision of said voters, and by reason thereof said election was illegal and a nullity, and the so-called amendment was not legally adopted and is not a part of the charter of the city of Portland.

Such proceedings and notice and ballot title and form of ballot as are set forth above, did not comply with the law so as to legally present any proposition for amending the charter of the city of Portland by inserting a section 118½, and did not give legal information and notice as to what would be the terms and meaning of section 118½ of the charter, if any section 118½ was to be added to the charter of the city of Portland, by said proceedings and election, and at said election 10,078 votes were cast "152 X Yes" upon said ballots and 6061 votes were cast "153 X No" upon said ballots at said city election, and at said city election there was a total vote cast of 17,935, of which number 796 voting did not vote upon this matter, and there were 33,041 duly registered voters of said city at the time of said election, of which 15,902 did not vote upon this matter, and by said vote and proceedings there was not legally adopted as an amendment to the charter of the city of Portland any section 118½.

That by said election being held upon the proceedings and notice set forth above, and by the form and words of ballot title used, and by the form and words of ballots used as set forth above, the said election as to amending the charter of the city of Portland by adding any additional section 118½ thereto was not held in mode and manner provided by law, but was held in violation of law and in such manner as to deprive large numbers of the duly registered legal voters of the city of their right to vote upon the

38 measure of inserting any section 118½ in the charter of the city, and large numbers of the duly registered legal voters of the city of Portland were by reason of the facts set forth herein deprived of their right to vote upon the question of inserting any section 118½ in the charter of the city of Portland, and said election was void as to any attempt to amend the charter of the city of Portland by adding anything as section 118½.

The resolution of March 31, 1909, was so worded and the ballots were in such form, and so worded, and the ballot title on the ballot, as to amending article VI of chapter III of the charter of the city of Portland by inserting section 118½ was in such form and so worded, and published notice was so numbered and worded, that it was im-

possible for the voters or any one, to know, and the voters did not know what they were voting for or against when they voted "152 X Yes" and "153 X No," and it was and is impossible for any one to know what the voters of the city of Portland voted for or against on June 7, 1909, when 10,078 votes were cast "152 X Yes" and 6061 were cast "153 X No" and the other 15,902 registered voters of the city of Portland did not vote upon this matter at all, and there has not been any section 118½ adopted as an amendment to the charter of the City of Portland.

If the Court holds that said resolution of March 31, 1909, is sufficiently definite to be a valid resolution and the election caused said proposition so attempted to be submitted to the voters by said resolution of March 31, 1909, to be adopted as a part of the charter of the city of Portland, then plaintiff alleges that the charter of the city of Portland must have been amended only as authorized by said resolution of March 31, 1909, and to contain authority to do only what is provided for in said resolution of March 31, 1909, to wit: authorize the council of the city of Portland to issue and dispose of bonds in an amount not exceeding two million dollars to be used for the purpose of constructing a new bridge across the Willamette river, from Broadway street on the east side of said river, to a point at or near Sixth and Irving streets on the west side of said river, and in said ordinance No. 20,208 set forth above, the defendants are illegally attempting to issue bonds for the purpose of building an unauthorized bridge in an unauthorized place and way, to wit: to construct a high bridge with appropriate approaches, terminals, piers, abutments and supports, from a point at or near the intersection of Broadway and Larrabee streets, on the east side of the Willamette river, and following the line of Broadway street, extended westerly in its present course, to a point at or near its intersection with Seventh street on the west side of said river; and that is an entirely different location and bridge, and the defendants, in any suit, have no such power and authority, and the acts of defendants are illegal, and unauthorized and should be enjoined in this suit.

The council and voters of the city of Portland, in amending the city charter, are exercising a special, limited and delegated power and must proceed in the mode and manner provided by law, and that requires that the council shall submit any proposed amendment to the charter of the city to the legal voters by resolution, and such resolution to be valid and accomplish the purpose of the law, must set out what is proposed as a definite amendment, so that the legal voters can themselves decide and determine what is to be inserted in the charter, and authorized by the amended charter, and not leave the matter indefinite and to be decided by other persons. Even the Act claimed by defendants to be section 118½ of the charter, and set forth above, is so indefinite that the voters did not have any opportunity to decide upon and authorized the height, width, material, plan or cost of said proposed bridge, nor where said proposed bridge shall extend and end, but all the vital and material parts of an authorization of a proposed bridge is attempted by said pretended

section 118½ to be delegated to the decision of unknown persons, to be selected after the election and decision to be made after the election, instead of being passed upon and decided by the voters of the city of Portland at said election, whereby said entire proceeding is illegal and void, as the power must be exercised by the voters, if at all, and not delegated, and there is no legal power to authorize the passage of ordinance No. 20,208, set forth above.

40 That said pretended section 118½ has the following provisions therein: "After the construction of such bridge, the Executive Board, or its successors in office, shall surrender and deliver the possession of the same to the County Court of Multnomah County, state of Oregon, and such court shall operate, control and manage the same and keep the same in repair in the same manner as other bridges crossing the Willamette river within the city of Portland are operated, controlled and managed as required by law."

It is not within the power of the Council and voters of the city of Portland, who are not the county of Multnomah, to adopt an amendment to the charter of the city of Portland whereby the city of Portland may build a bridge across the river and when built require the officers of the city of Portland to surrender and deliver the possession of the same to the county court of Multnomah county, state of Oregon, and provide and require that such county court shall operate, control and manage the same and keep the same in repair in the same manner as other bridges crossing the Willamette river within the city of Portland (and which are built, operated, maintained and managed under and by virtue of the Acts passed by the legislative assembly of the state of Oregon) are operated, controlled and managed as required by law enacted by said legislative assembly of the state of Oregon.

This lack of power has been fully conceded by the defendants in open court in this case and decided by this court in this case. This part of what is claimed to be section 118½ cannot be severed from the rest of the pretended act without affecting its entire validity, and the council and voters in amending the charter of the city of Portland exercise a limited special, delegated law-making power which requires that the council submit by resolution the proposed charter amendment to the electors, who must vote for or against the proposed amendment as submitted to them by the council, and the entire proposed amendment to the charter must be adopted or rejected by the voters of the city, and there is no one authorized to

41 decide that part of the amendment to the charter attempted to be submitted to the voters of Portland is valid, and part invalid. No one is authorized to decide what the council or the voters would have done upon the proposed amendment if it had been changed by removing said invalid portion. None can exercise the power of the council of Portland in amending the charter but the council. No one can exercise the power of the voters of Portland, in amending the charter, but the voters. The invalid portion of said pretended charter amendment is a material and inseparable part of the entire pretended charter amendment and a

material inducement to every one attempting to vote upon said pretended amendment.

The entire pretended charter amendment is illegal and void because of the invalidity of said part so set forth, and there is no legal power to pass said ordinance No. 20,208 and issue bonds.

That said pretended section 118½ pretends to authorize the council of the city of Portland to issue bonds of the city of Portland not exceeding two million dollars in amount for the purpose of building a bridge across the Willamette river, and pretends to authorize from the funds so provided for, the Executive Board of the city of Portland, Multnomah county, state of Oregon, and its successors in office, in the name of the city of Portland, to construct and build a bridge with appropriate approaches and terminals, and with a clearance of not less than 65 feet above high water and not less than 96.13 feet above the city datum or low water mark, across the Willamette river in said city from Broadway street at or near its intersection with Larrabee street on the east side of said river, and following the line of Broadway street extended westerly in its present course, to a point at or near its intersection with Seventh street on the west side of said Willamette river.

The Willamette river through Portland is a navigable river. The state of Oregon owns the Willamette river running through the city of Portland, and the bed thereof, subject to the power of the government of the United States of America, and the council of the city of Portland, and the voters of the city of Portland, have no power or authority from the state of Oregon to authorize a bridge to be build across said Willamette river, and the bed thereof, and thus obstruct said river so owned by the State of Oregon, and the said pretended section 118½ is illegal and void on this account. The council and voters of the city of Portland cannot exercise the sovereign powers of the state of Oregon over said Willamette river and its bed.

The state of Oregon has in no way authorized or empowered or consented to the city of Portland building said proposed bridge, or any bridge across the Willamette river at said points, nor attempted so to do, and until said state of Oregon authorizes, empowers, or consents to the building of said proposed bridge across the Willamette river, the defendants have no power or authority to pass said ordinance No. 20,208, to sell bonds, and to issue and sell bonds for the tax payers of the city of Portland to pay, with interest, and the attempt of defendants so to do is an illegal attempt to misuse their official positions, as officers of the city of Portland, to the detriment of plaintiff and all other taxpayers, and should be enjoined by the court in this suit.

The government of the United States of America has supreme authority over the navigable Willamette river at the points where said proposed bridge is to be built, and the council of the city of Portland, and the voters of the city of Portland, have no power or authority from the government of the United States of America to authorize a bridge to be built across said Willamette river, and the bed thereof, or to construct any such bridge, and thus obstruct said

river so under the control of the government of the United States of America. The council and voters of the city of Portland cannot exercise the sovereign powers of the government of the United States of America over said Willamette river, and its bed, and authorize the construction of any such bridge.

The government of the United States of America has in no way authorized or empowered or consented to the city of Portland building said proposed bridge, or any bridge, across the Willamette river at said points, nor has the government of the United States of America attempted so to do, and until said government of the United

43 States of America authorizes, empowers or consents to the building of said proposed bridge across the Willamette river, by the defendants, the defendants have no power or authority to pass said ordinance No. 20,208, to sell bonds and to issue bonds and sell them for the taxpayers of the city of Portland to pay with interest, and the attempt of defendants so to do is an illegal attempt to misuse their official position as officers of the city of Portland, to the detriment of plaintiff, and all other taxpayers, and should be enjoined by this court in this suit.

VII.

If the court holds that said pretended section 118½ is a valid part of the amended charter of the city of Portland, it contains no authority authorizing the defendants to pass ordinance No. 20208 with the untrue recitals therein contained and set forth above, and said ordinance contains recitals that are too broad and are beyond the power of the council, and the proceedings of the defendant under said ordinance No. 20208, for the issuance of said bonds, should be enjoined in this suit.

VIII.

The defendants have no power or authority to pass said ordinance No. 20208 and issue said bonds, and the acts of the defendants are illegal and void for the reason that the entire basis for the acts of the defendants set forth herein are illegal amendments attempted to be made to the constitution of the state of Oregon, section 2, article XI, as attempted to be amended in 1906, and section 1 of article IV of the constitution of Oregon, as attempted to be amended in 1902, and article IV of the constitution of Oregon, as attempted to be amended by inserting section 1-A in 1906, and said attempted amendments are illegal and void, because beyond the power of the people of the state of Oregon to adopt and make a part of the constitution of the state of Oregon. Said attempted constitutional amendments are without power and authority to authorize the officers and voters of a municipality in Oregon to attempt to adopt amendments to the charter of a municipality in Oregon, and especially the municipality of Portland, Oregon, and by such

44 amendments to said charter of Portland, attempt to authorize the issuing of bonds and the levying of taxes to pay said bonds in large amounts upon the property within the city of Portland, state of Oregon. Such initiative and referendum amendments

to the Constitution of Oregon, and attempted amendment to the charter of the city of Portland, set forth above in this complaint, and the attempt to issue bonds for the purpose of building a bridge, as set forth above, are each and all beyond the power of the people of the state of Oregon, and the people of the city of Portland, and the officers of the city of Portland, to do and accomplish, as said acts are in violation of and in contravention of article I sections 21, 22, 26 and 32 of the constitution of Oregon, also article IX, section 1 of the constitution of Oregon, and also in violation of sections 3 and 4 of article IV of the constitution of the United States of America, also in violation of article VI of the constitution of the United States of America, and also in violation of section 1 of the 14th Amendment to the constitution of the United States of America. The acts of the defendants, set forth above, are illegal and unconstitutional attempts, under pretended forms of law, for the illegal and unconstitutional exercise by the defendants of the powers of sovereignty which only reside in the state of Oregon, and its duly authorized officials, and defendants are not the duly elected and authorized officials of the state of Oregon, and the attempt by the defendants to issue bonds of the city of Portland, and thereby create a large indebtedness of the city of Portland, a municipal corporation which must be paid, if allowed, by levying taxes upon the property of taxpayers and citizens of the city of Portland, including this plaintiff, and thereby the defendants are illegally, and in violation of said constitutional provisions, attempting to tax in a large degree the property of this plaintiff, as well as all other taxpayers similarly situated, in violation of law and said constitutional provisions, and are attempting to deprive this plaintiff, and all others similarly situated, of his property, in violation of law, and to deprive this plaintiff and all others similarly situated, or their property, without due process of law, all in contravention of said provisions of the Oregon constitution mentioned above, and of said provisions of the constitution of the United States of America mentioned above.

When the state of Oregon was admitted into the Union of the United States of America as a sovereign state, the people of said state prepared and adopted a republican form of government, and the said constitution, and the said republican form of government were approved by the government of the United States of America, under the authority of the constitution of the United States of America. In said constitution of Oregon, article I, section 21, it was provided that no law shall be passed the taking effect of which shall be made to depend upon any authority, except as provided in said constitution at that time, provided that laws submitting town and corporate acts and other legal and special acts by the Legislative Assembly, of the state of Oregon, may take effect or not, upon a vote of the electors interested, and said provision of said constitution of Oregon is in full force and effect, and it is not within the province of the officers and electors of the city of Portland to attempt to pass an amendment to the charter of the city of Portland, whereby said officers and electors shall exercise the functions of the state of Ore-

gon, and submit town and corporate acts and other local and special laws to the vote of the electors interested, for the purpose of having the electors interested both enact said measures as law, and also provide that said measures shall take effect by the act of said electors within the legislative assembly of the state of Oregon passing thereon.

Article I, section 22 of the constitution of Oregon, is still in force and effect, and under and by virtue thereof, it is not within the power of the officers and electors of the city of Portland, without any reference to the authority of the Legislative Assembly of the state of Oregon to attempt to suspend the operation of Sections 75 to 92, inclusive, of the charter of the city of Portland, passed by the Legislative Assembly of the State of Oregon, as is attempted to be done by the proceedings set forth above in this complaint, and ac-

quire a public utility by the issuance of bonds of the city of
46 Portland by the action of the officers and electors of the city of Portland, as is attempted to be done by the acts set forth above.

Article I, section 26, of the constitution of Oregon, is in full force and effect and by its provisions it is provided that no laws shall be passed restraining any of the inhabitants of the state from applying to the legislature for redress of grievances, and by the acts set forth above the officials of the city of Portland and the electors of the city of Portland are attempting to inflict grievous burdens upon plaintiff, and all others similarly situated, by the mere act of said defendants and the electors of the city of Portland, under pretended forms of law, and plaintiff and others similarly situated, are deprived by the acts of the defendants, and said attempted initiative and referendum amendments if legal, from applying to the legislature for the redress of said grievances and this is in violation of said provisions of the Oregon constitution.

Article I, section 32 of the constitution of Oregon, is in full force and effect, and thereby it is provided that no tax or duty shall be imposed without the consent of the people, or their representatives in the legislative assembly, and all taxation shall be equal and uniform, and the defendants under and by virtue of said acts are attempting to issue bonds and levy taxes upon the plaintiff, and all others similarly situated, without the consent of the people of the state of Oregon, and without the consent of their representatives in the Legislative Assembly of the state of Oregon.

Article IX, section 1, of the constitution of Oregon, is in full force and effect, and by said constitution and provision it is provided that the Legislative Assembly shall provide by law for uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious and charitable purposes as may be specially exempted by law, and the defendants acting by,
47 through and under said pretended constitutional amendments and acts set forth above are claiming the right in the officers of the city of Portland, and in the electors of the city of Portland

to pass laws assessing and taxing the property of plaintiff, and all other persons similarly situated, without any regard to the Legislative Assembly of the state of Oregon and laws passed thereby, all in violation of said constitutional provision.

Section 3 of Article IV of the Constitution of the United States of America provides that no state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states or parts of states, without the consent of the Legislatures of the states concerned, as well as of the Congress, and said attempted initiative and referendum amendments to the constitution of Oregon are in violation of said provision of the United States Constitution, for the reason that by said attempted initiative and referendum amendments to the constitution of Oregon the officers and electors of a municipality within the state of Oregon are illegally attempted to be given power and authority under a so-called amendment of the charter of the municipality to exercise sovereign power of the state and to create a new state out of said municipality or it and adjoining territory, within the jurisdiction of the state of Oregon, and this can be done, without the consent of the Legislature of the state of Oregon, and without the consent of the Congress of the United States of America, if said initiative and referendum amendments are valid, and by these means the state of Oregon can be divided into many smaller states and its sovereignty and power completely impaired and frittered away. In fact, the defendants, in the case at bar, are illegally claiming, by the acts set forth above, that the council of the city of Portland, and some of the voters of the city of Portland, have the power to and have granted a franchise to the city of Portland across the property of the state of Oregon, to-wit: the navigable Willamette river and its bed in said city, from Broadway street on the east side of said river, extended westerly across said river to the west side thereof, for the purpose of erecting and maintaining a bridge, without the authority or consent of the state of Oregon. The granting of a franchise to build and maintain a bridge across the navigable Willamette river and said point can only be done by the sovereign power of the state of Oregon, and the sovereign power of the United States of America acting jointly. If the council of the city of Portland, can exercise such sovereign power in the case at bar, there is no limit to their sovereign power. Also in the case at bar the council of the city of Portland, and some of the voters of the city of Portland, have attempted to exercise the sovereign power of the state of Oregon over the county of Multnomah, by attempting to provide that the county of Multnomah shall operate, control, manage and keep in repair in the same manner as other bridges crossing the Willamette river within the city of Portland are operated, controlled and managed, as required by law enacted by the sovereign state of Oregon. If the council of the city of Portland, and some of the voters of the city of Portland, can exercise such sovereign power in the case at bar, there is no limit to their sovereign power. Also in the case at bar the council of the city of Portland, and some of the voters of the city of Portland, are at-

tempting to exercise sovereign power by attempting to authorize the defendants to exercise sovereign power over the property of this plaintiff and all others similarly situated, by means of issuing bonds and imposing taxes upon the property within said city of Portland, and said powers of issuing bonds and imposing taxes can only be legally exercised by those possessing the sovereign power of the state of Oregon, and the council of the city of Portland, and some of the voters of the city of Portland, and the defendants, have not the sovereign power of the state of Oregon so long as section 3 of Article IV of the Constitution of the United States of America is in force. The state of Oregon has not in any manner selected the defendants, or authorized the defendants, as the lawful and authorized officers of the state of Oregon, to do the acts which the defendants are attempting to do, and these defendants are not

49 officers of the state of Oregon, and have no right to exercise the sovereign powers of the state of Oregon over the property of the state of Oregon, and the property of this plaintiff, within said city of Portland, and of other property owners similarly situated. By the acts set forth herein, and said illegal initiative and referendum amendments, the defendants are attempting to take away from the state of Oregon its sovereign powers, destroy its Republican form of Government, and to deprive plaintiff and others similarly situated of their property without due process of law.

The acts of the defendants are in violation of section 4 of Article IV of the Constitution of the United States of America, for the reason that the acts of said defendants if held to be constitutional and legal destroy the republican form of government of the state of Oregon, and divide said state of Oregon into as many states, endowed with and exercising sovereign power, as there are municipalities in the state of Oregon, with the power in the officers and electors of the municipalities of the state of Oregon to completely destroy the sovereignty of the state of Oregon, and its republican form of government.

The acts of the defendants and said initiative and referendum amendments of the constitution of Oregon are void, under said constitutional provisions set forth herein. The acts set forth above in this complaint, done by these defendants are done without any right or authority therefor, and in violation of the law and defendants are attempting to deprive the plaintiff, and all other persons similarly situated, of their property by means of illegal issuance of bonds and taxation to pay said bonds without due process of law in violation of the 14th amendment to the Constitution of the United States of America, and the said acts of defendants are unconstitutional and void.

IX.

That Joseph Buchtel has filed what purports to be a suit in the Circuit Court of the state of Oregon, for the county of Multnomah against the defendants purporting to assail the legality of the
50 acts of the defendants, but in said suit said Joseph Buchtel has failed to allege the facts constituting the illegal acts of the defendants, and on the other hand, has alleged that the defend-

ants are complying with the law when they are not, and said suit is brought as a friendly suit with the defendants for the purpose of co-operating with the defendants in an effort to obtain a decree from the courts adjudging that the acts of the defendants are lawful instead of unlawful, and this plaintiff prays that the said defendants be enjoined from prosecuting said friendly suit, and this plaintiff asks that the court refrain from entering any decree in said suit at the solicitation of said defendants, and asks that said suit be consolidated with this suit and that no decree be entered therein until a decree is entered in this suit, and that the same decree be entered in that suit that is entered in this suit. This plaintiff caused said Joseph Buchtel to be served with process in this suit on November —, 1909, and said Joseph Buchtel did not appear herein, but made default, and upon this case coming on for argument upon demurrer to the complaint in the circuit court upon January —, 1910, said Joseph Buchtel caused his said friendly suit to be dismissed and plaintiff herein caused the default of said Joseph Buchtel to be entered herein.

X.

The plaintiff has no speedy or adequate remedy at law, nor any remedy at all at law. That unless restrained by this Honorable Court the defendants will proceed to advertise said bonds, proceed to receive bids and sell said bonds and create a cloud upon the property of plaintiff, and all others similarly situated, and subject the plaintiff, and all others similarly situated, to loss and expense by reason of said illegal acts of the defendants.

Wherefore plaintiff prays this Honorable Court of Equity will assume jurisdiction of this suit in equity, will issue a temporary injunction, restraining the defendants and each of them, from further carrying on any of the acts set forth in this complaint, and that

51 upon the final hearing the court will enter a decree, granting a permanent injunction against the defendants, and each of them, from attempting to do any of the acts set forth in this complaint, and decreeing that the initiative and referendum amendments to the constitution of the state of Oregon are in violation of the constitution of Oregon and of the United States of America, and beyond the power of the people of the state of Oregon to adopt, and as also attempting to grant powers which are destructive of the sovereignty of the state of Oregon and violative of the constitution of the United States of America, and are void, and that the attempts to claim power and authority in the charter of the city of Portland, to issue two million dollars of bonds, or any less sum of bonds, for the purpose of constructing a new bridge across the Willamette river from Broadway Street on the East side of said River to a point at or near Sixth and Irving streets on the West side of said river, in the city of Portland, county of Multnomah and state of Oregon, or any similar structure, in any similar place, or issuing any bonds for any similar purpose, be declared illegal and void and enjoined, and that plaintiff have such further, other and different relief as to a Court of Equity seems meet and equitable.

RALPH R. DUNIWAY,

Attorney for Plaintiff.

32 FRANK KIERNAN VS. THE CITY OF PORTLAND ET AL.

52 STATE OF OREGON,
County of Multnomah, ss:

I, Frank Kiernan, being first duly sworn, depose and say that I am the plaintiff in the above entitled suit; and that the foregoing amended complaint is true as I verily believe.

FRANK KIERNAN.

Subscribed and sworn to before me this 21st day of Febr., 1910.
[NOTARIAL SEAL.] RALPH R. DUNIWAY,
Notary Public for the State of Oregon.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within Amended Complaint is hereby accepted in Multnomah County, Oregon, this 21st day of February, 1910, by receiving a copy thereof, duly certified to as such by Ralph R. Duniway, Attorney for Plaintiff.

J. P. KAVANAUGH,
Attorney for Defendants,
By R. A. SULLIVAN, *Deputy.*

53 And afterwards on the 2nd day of April, 1910, there was filed in said office an

Answer

in words and figures as follows, to-wit:

(Title)

The defendants answering the amended complaint of the plaintiff admit and deny as follows:

I.

As to the allegations of paragraph I of plaintiff's amended complaint, defendants allege that they have no knowledge or information sufficient to form a belief as to the truth of the same and therefore deny each and every allegation thereof.

II.

Defendants answering paragraph II of plaintiff's amended complaint admit that the City of Portland is and was during all the times mentioned in the said amended complaint a duly organized and existing municipal corporation, under the laws of the State of Oregon.

Defendants admit that defendant Joseph Simon is the duly elected, qualified and acting Mayor of the City of Portland and was such mayor on the date of the filing of said amended complaint.

Defendants admit that defendant A. L. Barbur is and was at the

time of filing said amended complaint, the duly elected, qualified and acting Auditor of said City of Portland.

Further answering said paragraph II of said amended complaint defendants deny each and every allegation in said paragraph contained, save and except as hereinbefore admitted.

54

III.

Answering paragraph III of plaintiff's amended complaint defendants admit that there was a regular meeting of the Council of said City held at the City Hall in said City on October 27, 1909, and defendants admit that an Ordinance No. 20208, entitled

"An Ordinance providing for the issuance and sale of bonds of the City of Portland, for the construction of a high bridge across the Willamette River, from a point at or near Broadway and Larrabee Streets on the East side of said River, and following the line of Broadway extended westerly in its present course to a point at or near its intersection with Seventh Street on the West side of said river, with its approaches, terminals and necessary accessories, approving the form of said bonds and the coupons to be attached thereto and declaring an emergency."

was passed by said Council of said City on said date and that said defendant, A. L. Barbur, the Auditor of said City, has said document in his possession as a valid ordinance of said City, and that the same is so filed and recorded.

Defendants admit that said ordinance recites that a certain amendment of the Charter was approved by the affirmative vote of the electors of the City of Portland at the general election held in said City on Monday June 7, 1909; and defendants admit that said ordinance No. 20208 recites that the Executive Board of the defendant City, and its successors in office, was authorized and empowered thereby, in the name of the defendant City to construct a bridge

55 with approaches, terminals, piers, abutments and supports, from a point at or near the intersection of Broadway and Larrabee Streets on the East side of the Willamette River, and following the line of Broadway Street, extended westerly in its present course, to a point at or near its intersection with Seventh street on the West side of said river, thence Southerly and Easterly to a point at or near the intersection of Sixth and Irving Streets in said defendant City, and that the west approach and incline of said bridge was recited as being subject to modification and change by said Executive Board, or its successors.

Defendants admit that said Ordinance No. 20208 recites that said act and amendment authorizes and empowers the Council of the defendant City, in the name of and under its corporate seal, to provide a fund for the construction of said bridge, its approaches, terminals, piers, abutments and supports, and to issue and dispose of bonds of defendant City to an amount not exceeding the sum of two million dollars, of the denomination of \$500.00 or \$1000.00 each, with interest coupons attached thereto.

Defendants admit that said ordinance recites that said act so

authorizing said building of said bridge and the issuance of bonds therefor went into effect upon the proclamation of the Mayor of the defendant City and that the same had been passed by an affirmative majority of all the votes cast thereon at said election and that said proclamation was signed by said Mayor in the 24th day of June, 1909, and filed in the office of the Auditor of defendant City of the said day.

Defendants admit that said Ordinance No. 20208 declared that the Council of the City of Portland deemed it expedient and necessary that said bonds to the amount of two hundred and fifty thousand (\$250,000.00) Dollars be issued and sold and that

56 Council passed an ordinance authorizing and directing the issue of bonds in the sum of \$250,000.00 with interest coupons attached thereto, and that said bonds should be dated the 1st day of July, 1909, and should be signed by the Mayor and countersigned by the Auditor of defendant City, and that defendant City should be held and considered in substance and effect to understand and promise in consideration of the premises to pay to the bearer of each of said bonds at the expiration of thirty years from the date thereof, the sum named therein in Gold Coin of the United States of America, with interest thereon at the rate of four per cent. per annum, payable half yearly, and that said bonds should be known as the "Bridge Bonds of the City of Portland, Series 1909."

Defendants admit that said ordinance sets forth a form of said bridge bonds and that in said form of said bridge bonds the Council of defendant City inserted, or was to insert, certain recitals as to the authority of the defendant City and its Council to issue said bonds and that said recitals were and are to the effect that the defendant City and its Council, Mayor and Auditor have lawful authority to issue the same by virtue of and in full and strict accordance with the provisions of said amendment to the Charter of said defendant City, and that said recitals stated that the amendment to said Charter was adopted by the electors of said defendant City on the 7th day of June, 1909.

Defendants admit that the said ordinance No. 20208 requires and directs the Auditor of defendant City to advertise for proposals for the sale of said bonds.

Defendants admit that an emergency clause of the tenor and effect alleged in paragraph III of plaintiff's amended complaint was enacted as a part of said Ordinance No. 20208.

Defendants further answering said paragraph III of plaintiff's amended complaint, deny each and every allegation in said paragraph.

57 Defendants admit that the following words were printed upon the ballot used by the voters, to-wit:

"Two million dollars bridge bonds to be authorized to construct a high bridge across Willamette River from Broadway and Larrabee Street on the East side, following the line of Broadway street extended westerly in its present course to a point at or near its intersection with Seventh Street on the west side, by an Amendment

Article VI, Chapter III of the Charter of the City of Portland by inserting therein a new section to be known as Section 118½.

Shall Article VI, Chapter III of the Charter of the City of Portland be amended by inserting Section 118½?

152 Yes.

153 No."

Defendants admit that at said election a large number of persons were voted for as candidates for offices and that a number of measures were voted upon.

Defendants admit that on June 24, 1909, the Mayor of the City of Portland issued a proclamation, the tenor and effect of which was as alleged in said paragraph IV of plaintiff's amended complaint.

Defendants further answering said paragraph IV of plaintiff's amended complaint, deny each and every allegation therein contained, save and except as hereinbefore admitted.

V.

Defendants answering paragraph V of plaintiff's amended complaint, admit that a petition was filed April 7, 1908, requesting the City to build a bridge across the Willamette river from Broadway Street in said City to the west side of said River.

Defendants admit that on May 8, 1908, a certain letter was sent by the Auditor of the defendant City to the Mayor thereof, notifying him of the filing of such petition.

Defendants admit that on October 20, 1908, there was a petition for a bridge across said river presented at a meeting of the Council of defendant City.

Defendants admit that on October 27, 1908, the City Attorney of defendant city filed a written opinion with the said Auditor stating the necessary plan of procedure to acquire said bridge.

Defendants admit that at a meeting of the Council of defendant City on November 11, 1908, an ordinance was passed and on November 12, 1908, was submitted to the Mayor of defendant City and that the same was not approved by him nor returned with his reasons for not approving it within ten days thereafter.

Defendants admit that said last mentioned ordinance was numbered 18531 and was entitled as in paragraph V of plaintiff's amended complaint stated.

Defendants admit that the contents of said Ordinance No. 18531 are substantially of the tenor and effect set forth in said paragraph V of plaintiff's amended complaint.

Defendants admit that on or about November 25, 1908, the Council of defendant City, passed a resolution, the tenor and effect of which is as set forth in said paragraph V of said amended complaint.

Defendants admit that at a meeting of the Council of the defendant City, on February 17, 1909, said Council passed a certain ordinance which was submitted to the Mayor for approval on the same day, and on February 23, 1909, said Mayor approved said ordinance; that said ordinance was numbered entitled and of the

tenor and effect as in said paragraph V of plaintiff's amended complaint alleged.

59 Defendants admit that at a meeting of the Council held in said City on March 31, 1909, the Council of defendant City passed an ordinance and submitted the same to the Mayor of said City for his approval on April 3, 1909, and that said ordinance was approved by said Mayor on April 15, 1909.

Defendants admit that said ordinance above named was numbered, entitled and of the tenor and effect as in paragraph V of plaintiff's amended complaint alleged.

Defendants admit that no city election was held on May 8, 1909.

Defendants admit that no election was held in the City of Portland on April 23, 1909, and that said amendment was not adopted on April 23, 1909.

Further answering said paragraph V of plaintiff's amended complaint, defendants deny each and every allegation therein contained, save and except as hereinbefore admitted.

VI.

Defendants answering paragraph VI of plaintiff's amended complaint, admit that an Ordinance No. 16311 was passed by the Council of said City on March 21, 1907, and approved by the Mayor on March 26, 1907; and that said ordinance provided that an amendment to the Charter of defendant City might be proposed and submitted to the legal voters of the said City by resolution of the Council and that no part of the Charter should be affected until it was approved by a majority of the votes cast thereon by the legal voters of said defendant city.

Defendants admit that no election was held on April 23, 1909.

Defendants admit that the ballot title to said amendment described said bridge as a high bridge.

60 Defendants admit that the Auditor of defendant City caused to be published a copy of said amendment in the Portland Daily Abstract on May 15 and 17, 1909.

Defendants admit that the resolution of March 31, 1909, provides that the electors who vote upon the question set forth in said resolution shall vote "Yes" or "No" thereon.

Defendants admit that the words "Charter Amendments submitted to the voters by the Council" was not printed upon the official ballot.

Defendants admit that Section 6 of Ordinance No. 163,111 provides that "The Auditor of the City of Portland shall number such measures and ballot titles in the most convenient and consecutive manner. The affirmative of the first measure shall be numbered 100, and the negative 101 in numerals, and the succeeding measures shall be numbered 102, 103, 104, 105, and so on," and that section 10 of said ordinance provides that "The Auditor shall publish such proposed charter amendment with the ballot title and number in full in the City Official Newspaper for two consecutive publications thereof, not later than twenty days before the election at which such amendment is to be voted upon."

Defendants admit that the Willamette river through Portland is a navigable river.

Defendants further answering paragraph VI of plaintiff's amended complaint, deny each and every allegation therein contained, save and except as hereinbefore admitted.

VII.

Defendants answering paragraph VII of plaintiff's amended complaint, deny each and every allegation therein contained.

VIII.

Defendants answering paragraph VIII of plaintiff's
61 amended complaint, admit that upon the admission of the State of Oregon in the United States, the people of the state of Oregon adopted a republican form of Government and that the same was approved by the United States government.

Defendants admit that the Constitution of the State of Oregon provides that no laws shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in said Constitution.

Defendants admit that Article I, Section 22 of the Constitution of Oregon is in full force and effect, except as it may be modified by subsequent amendments to said Constitution.

Defendants admit that Article I, Section 26 of the Constitution of Oregon is in full force and effect, except as it may be modified by subsequent amendments to said Constitution.

Defendants admit that Article I, Section 32 of the Constitution of Oregon is in full force and effect, except as it may be modified by subsequent amendments.

Defendants admit that Section 3 of Article IV of the Constitution of the United States of America provides in substance that no state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states or parts of states, with- the consent of the Legislatures of the states concerned and that of Congress.

Defendants further answering paragraph VIII of plaintiff's amended complaint, deny each and every allegation therein contained, save and except as hereinbefore admitted.

IX.

Defendants answering paragraph IX of plaintiff's amended complaint, admit that defendant Joseph Buchtel commenced a suit
62 said Buchtel in January, 1910.

Further answering paragraph IX of plaintiff's amended complaint, defendants deny each and every allegation therein contained, save and except as hereinbefore admitted.

X.

Defendants answering paragraph X of plaintiff's amended complaint deny each and every allegation therein contained.

Defendants for a first separate answer and defense to the amended complaint of the plaintiff allege:

Wherefore the defendants pray a decree:

(1) If plaintiff ought to be permitted, contrary to his acts, conduct, neglect and silence to claim and prove or to attempt to claim and prove, that said amendment was not lawfully adopted, or that any voters were misled at said election, or that said amendment is not a law of said City, or that said amendment was or is in any respect irregular or invalid.

(2) Defendants further pray that this suit be dismissed, and for their costs and disbursements therein.

(3) Defendants further pray for such other and further relief as to the Court may seem just in the premises.

J. P. KAVANAUGH,
City Attorney.

M. L. PIPES,
C. W. FULTON,
H. H. RIDDELL,
W. C. BENBOW,
Attorneys for Defendants.

63-74 STATE OF OREGON,
County of Multnomah, ss:

I, J. P. Kavanaugh, being first duly sworn, depose and say, that I am the City Attorney of Defendant the City of Portland, in the above entitled suit, and that the foregoing answer is true as I verily believe.

J. P. KAVANAUGH.

Subscribed and sworn to before me this 1st day of April, 1910.

[NOTARIAL SEAL.]

WM. C. BENBOW,
Notary Public for the State of Oregon.

STATE OF OREGON,
County of Multnomah, ss:

Due and legal service of the within answer is hereby accepted in Multnomah County, Oregon, this 1st day of April, 1910, by receiving a copy thereof, duly certified to as such by J. P. Kavanaugh, of Attorneys for Defendants.

RALPH R. DUNIWAY,
Per C. L.,
Attorney for Plaintiff.

75

And afterwards on the 21st day of May, 1910, there was filed in said office a

Motion for Decree

in words and figures as follows, to-wit:

(Title.)

The attorneys for plaintiff having been orally notified by the attorneys for the defendants, that defendants did not desire to file any amended answer, but elected to stand upon the answer of defendants in its present condition.

1. Comes now the above named plaintiff by his attorney and respectfully moves the court to render and enter a decree in the above entitled court and cause, permanently enjoining the defendants and each of them from attempting to carry out Ordinance No. 20208, entitled:

"An Ordinance providing for the issuance and sale of bonds of the City of Portland for the construction of a high bridge across Willamette River from a point at or near Broadway and Larrabee Streets on the East side of said River, and following the line of Broadway street extended westerly in its present course to a point at or near its intersection with Seventh Street on the west side of said river, with its approaches, terminals and necessary accessories, approving the form of said bonds and the coupons to be attached thereto and declaring an emergency," which ordinance was passed by the council of the City of Portland, October 27th, 1909, and the Mayor of the City of Portland on October 27th, 1909, approved the same and setting aside said ordinance as illegal and invalid upon the ground that the answer of the defendants admits sufficient of the material allegations of the amended complaint to justify and require the above entitled court to enter such decree upon the pleadings as it clearly appears upon the face of the pleadings in this case that the city of Portland and its officers have no power to pass and carry out said ordinance No. 20208.

2. Comes now the above named plaintiff and moves the court to enter a decree in the above entitled court, and each of them
76 enjoining the defendants and each of them from claiming that there is any Section 118½ in the Charter of the City of Portland, and enjoining the defendants and each of them from attempting in any way to issue or sell bonds of the City of Portland in any sum or amount, for the purpose of constructing a bridge across the Willamette river from Broadway street on the East side to the West side of the river, and adjudging and decreeing that there is no authority in the Charter of the City of Portland, authorizing and permitting the City of Portland, or any of its officers, to in any manner construct or attempt to construct a bridge of any description from Broadway Street on the East side of said river across said River to any point on the west side of said river, or to sell bonds or attempt to sell bonds for any such purpose as the erection of any such bridge,

upon the ground that the said answer of defendants in said cause, admits sufficient of the material allegations of the amended complaint to justify and require said court to make said decree at this time and in this cause.

3. Comes now the above named plaintiff and if said court does not grant either one of the foregoing motions, respectfully moves the court for a decree in the above entitled cause adjudging what the defendants claim as Section 118½ of the Charter of the City of Portland is not, in fact, a valid part or any part of the Charter of the City of Portland, for the reason that what the defendants claim as Section 118½ of the Charter of the City of Portland is in conflict with the Constitution of the State of Oregon and the Constitution of the United States of America, and null and void, and plaintiff asks this decree upon the ground that the answer of the defendants admits such material parts of the amended complaint as to justify and require the court in this cause to render said decree upon the pleadings.

4. Comes now the above named plaintiff, and if the court declines to grant either one of the above motions for decree upon the pleadings, then plaintiff respectfully moves the court for a decree enjoining the defendants from attempting to do any of the acts alleged in the amended complaint, upon the ground that the following

77 part of alleged section 118½ of the Charter of the City of Portland, to-wit: "After the construction of such bridge the Executive Board or its successors in office, shall surrender or deliver the possession of the same to the County Court of Multnomah County, State of Oregon, and said court shall operate, control and manage the same and keep the same in repairs in the same manner as other approaches crossing the Willamette river within the city of Portland, operated, controlled and managed as required by law" is invalid and beyond the power of the city of Portland and its electors to adopt, and it has been so decided by this court in this cause, and the defendants have heretofore conceded in open court that that part of said alleged act is invalid, and that it results from the invalidity of that part of the act that the entire act is invalid and void, and there is no power in the courts or anyone else to hold that part of said — is valid and enforceable when part of it is invalid, and that the act must be valid in toto, and this appears upon the face of the pleadings in this suit and justifies and requires the court to so decree upon this motion for a decree upon the pleadings.

RALPH R. DUNIWAY,

Attorney for Plaintiff.

78 Upon the hearing of the annexed motion for a decree upon the pleadings, the plaintiff will urge the following points:

In support of the first motion plaintiff will urge that even if the charter of the city of Portland contains section 118½ as claimed by the defendants, even then the defendants have no authority to pass and carry out said ordinance No. 20208, as it is too broad in its terms to be within said alleged power, contained in said alleged section 118½ of the Charter of the City of Portland, and also that said alleged section 118½ of the charter of the city of Portland is too indefinite to authorize the defendants to proceed, and said alleged sec-

tion undertakes to illegally delegate authority and is no justification for the defendants to pass and carry out said ordinance No. 20208, and the acts of the defendants should therefore be permanently enjoined by this Court in this case.

Plaintiff will urge the points in support of the second motion annexed hereto that there is not in fact any section 118½ in the Charter of the City of Portland, and that there is no authority in the Charter of the City of Portland to issue and sell bonds in any amount for the purpose of attempting to construct a bridge of any description from Broadway Street from the east side of said river across said river to any point on the West side of said River, or to sell bonds or attempt to sell bonds for any such purpose, and will also urge the point that there has been no proceedings in the mode and manner required by law in order to amend the charter of the City of Portland and insert section 118½ in the Charter of the City of Portland, and there is no such section. This appears on the face of these pleadings.

Plaintiff will urge the following points to support the third motion annexed hereto, to-wit:

That what defendants claim as Section 118½ of the Charter of the City of Portland is not in fact a valid part or any part of the

79 Charter of the City of Portland, for the reason that what the defendants claim as Section 118½ of the Charter of the City of Portland is in conflict with the provisions of the Constitution of Oregon and of the Constitution of the United States of America specified in the amended complaint, and that this appears upon the face of the pleadings.

Plaintiff in support of the fourth motion annexed hereto will make the point that part of the alleged section 118½ of the Charter of the City of Portland is invalid and has been so adjudged to be invalid and beyond the power of the city of Portland and its electors to adopt, and has been so decided by this court in this case, and the defendants have heretofore conceded in open court, that part of said alleged act is invalid and that it results from the invalidity of that part of the act that the entire act is invalid and void, and that there is no power in the courts or anyone else to hold that part of said act is valid and enforceable when part of said alleged act is invalid, and that the act must be valid in toto or void in toto, and that it is not within the power of any court to adjudge that part of said act is valid and part is void, and if any court should attempt to so adjudge and decree that court would thereby attempt illegally to exercise legislative law-making power which is beyond the jurisdiction and powers of the courts, and would render any such decree or judgment of the court absolutely void upon its face, and would authorize, justify and require every person to ignore any such judgment or decree, and any such judgment or decree of any court would be subject to collateral attack and void upon its face, and that sufficient facts alleged in the amended complaint are admitted by the answer to justify and require the Court to enter the decree prayed for by plaintiff in this cause.

RALPH R. DUNIWAY,

Attorney for Plaintiff.

80-85 STATE OF OREGON,
County of Multnomah, ss:

Due service of the within Motion is hereby accepted in Multnomah County, Oregon, this 21st day of May, 1910, by receiving a copy thereof duly certified to as such by Ralph R. Duniway, Attorney for Plaintiff.

WM. C. BENBOW,
Of Attorneys for Def'ts.

* * * * *

86 And afterwards on Monday the 6th day of June, A. D. 1910, the same being the first Judicial day of said term of said Court, there was rendered and entered in said court an

Order

in words and figures as follows, to-wit:

(Title.)

This cause having been heretofore argued and submitted on plaintiff's motion for decree on the pleadings, and also on defendant's motion for a decree on the pleadings, and by the Court then taken under advisement, and the court having duly considered all the questions raised by the respective motions, and being now fully advised.

It is ordered that the separate motions of plaintiff and defendants for a decree on the pleadings be and each of them is hereby advised,

(Signed)

GEORGE H. BURNETT, Judge.

87-94 And afterwards on Tuesday the 14th day of June, A. D. 1910, the same being the 8th Judicial day of said term of said Court there was rendered and entered in said Court an

Order

in words and figures as follows, to-wit:

(Title.)

The above entitled cause having heretofore come regularly on for trial before the court, and the court on this day having made and filed herein its findings of fact and conclusions of law in favor of the defendants and against the plaintiff, and based thereon.

It is therefore ordered, adjudged and decreed that the above entitled suit be, and the same is hereby dismissed, and that the defendants have and recover of and from the plaintiff their costs and disbursements, taxed at \$15.00 and that execution issue therefor.

(Signed)

GEO. H. BURNETT, Judge.

95

Copy.

Pl'tff's Ex. G. Rejected. C. H. S., Off. Stenog.

DECEMBER 8, 1909.

Port of Portland, City Hall, Portland, Oregon.

GENTLEMEN: Enclosed please find plans, drawings, specifications and other documents relating to the Broadway Bridge to be constructed across the Willamette River from a point at or near the intersection of Broadway with Larrabee Street in the said City; thence following the line of Broadway extended westerly in its present course to a point at or near its intersection with Seventh Street on the west side of the Willamette River. These documents are presented to your Honorable Body for inspection and approval. We trust the enclosed documents will fully illustrate the proposed structure and advise you sufficiently concerning the details of its construction. It would be advisable, in view of the urgent demand for this new thoroughfare, to have all preliminary inspections procured as soon as possible.

Respectfully,
(Signed)

JOSEPH SIMON, Mayor.

Certificate.

I, John P. Doyle, do hereby certify that I am clerk of the Port of Portland Commission, and custodian of its records and that the foregoing is a true and correct copy of any application submitted to the Port of Portland Commission by Joseph Simon, Mayor of the City of Portland, on the 9th day of December, 1909, as the same appears of record in my office and in my care and custody.

[Seal Port of Portland.]

JOHN P. DOYLE.

96

Extract from Record of the Port of Portland.

"* * * The Chairman announced the purpose of the meeting to be consideration of the application of the Executive Board of the City of Portland for approval of the plans and construction of the proposed Broadway Bridge.

The Chairman stated to the Board that the act adopted by the people at the June election 1909 authorizing the construction of what is known as the Broadway Bridge, provided that the executive Board of the City of Portland shall have full power and authority, subject to such regulations as may be imposed by the United States, to build, erect and construct piers, abutments and other necessary supports in the bed of the Willamette River for the foundation of such bridge and the City Attorney having expressed the opinion that action on the part of this Commission was unnecessary, the Chairman therefore suggested that no action be taken upon the applica-

tion presented to this Commission by the Executive Board of the City of Portland for the approval of the plans of said bridge.

It was thereupon, on motion duly made and seconded, voted that the further consideration of this subject by this Commission be indefinitely postponed."

Certificate.

I, John P. Doyle, do hereby certify that I am clerk of the Port of Portland Commission and custodian of its records and that the foregoing is a true and correct copy from the record of a meeting of the said Commission duly called and held on the eleventh day of January, 1910, as the same appears on file and of record in my office and in my care and custody.

[Port of Portland Seal.]

JOHN P. DOYLE.

Plff's Ex. H. Rejected. C. H. S., Off. Stenog.

97

PL'FF'S EX. E.

Ordinance No. 20,208.

An Ordinance providing for the issuance and sale of bonds of the City of Portland for the construction of a high bridge across the Willamette River from a point at or near Broadway and Larrabee Streets on the east side of said River and following the line of Broadway Street, extended westerly in its present course, to a point at or near its intersection with Seventh Street on the west side of said river, with its approaches, terminals and necessary accessories, approving the form of said bonds and the coupons to be attached thereto, and declaring an emergency.

Whereas, by an act approved by the affirmative vote of the electors of the City of Portland at the general election held in said City on Monday, the 7th day of June, 1909, the Executive Board of the City of Portland, County of Multnomah and State of Oregon, and its successors in office, was authorized and empowered, in the name of said city, to construct a high bridge with appropriate approaches, terminals, piers, abutments and supports, from a point at or near the intersection of Broadway and Larrabee Streets on the east side of the Willamette River and following the line of Broadway Street, extended westerly in its present course, to a point at or near its intersection with Seventh Street on the west side of said river; thence southerly and easterly to a point at or near the intersection of Sixth and Irving Streets in said City, (the west approach and incline of said bridge being subject to modification and change by the Executive Board, or its successors, of said City), and,

Whereas, to provide a fund for the construction of said bridge, its approaches, terminals, piers, abutments and supports, said act authorized and empowered the Council of the City of Portland, in the

name of and under the corporate seal of said City, to issue and dispose of bonds of the City of Portland to an amount not exceeding Two Million Dollars (\$2,000,000.00), of the denomination of Five Hundred Dollars or One Thousand Dollars, as the Council might determine, with interest coupons attached thereto, and,

Whereas, said act went into effect upon the proclamation of the Mayor of the City of Portland that the same had been passed
98 by an affirmative majority of all the votes cast thereon at said general election, which proclamation was signed by said Mayor on the 24th day of June, 1909, and filed in the office of the Auditor of the City of Portland on the said 24th day of June, 1909, and,

Whereas, the Council deems it expedient and necessary that said bonds to the amount of Two Hundred and Fifty Thousand Dollars (\$250,000,000.00) be issued and sold without delay, now therefore,

The City of Portland does ordain as follows:

SECTION 1. That the Council of the City of Portland do issue bonds of the City of Portland, in the name of and under the corporate seal of said City, in the amount of Two Hundred and Fifty Thousand Dollars (\$250,000.00), in denominations of One Thousand Dollars (\$1,000.00) each, with interest coupons attached thereto. Said bonds shall be dated the first day of July, 1909, and shall be signed by the Mayor and countersigned by the Auditor of the City of Portland, whereby the City of Portland shall be held and considered in substance and effect to undertake and promise, in consideration of the premises, to pay to the bearer of each of said bonds, at the expiration of thirty years from the date thereof, the sum named therein, in Gold Coin of the United States of America, together with interest thereon at the rate of Four per centum per annum, payable half-yearly, which bonds shall be known as "Bridge Bonds of the City of Portland, Series 1909."

SECTION 2. That the following be and the same is hereby approved and declared to be the form of said Bridge Bonds of the City of Portland, Series 1909:

"Bond No. —,

City of Portland,

County of Multnomah, State of Oregon.

Bridge Bond of the City of Portland, Series 1909.

Payable in Gold Coin of the United States 30 Years After Date.

The City of Portland in the County of Multnomah and State of Oregon, for value received, acknowledges itself indebted and hereby promises, in consideration of the premises to pay to the bearer One Thousand Dollars in Gold Coin of the United States of America,
99 of the present standard weight and fineness, on the first day of July, 1939, after date, without grace, with interest thereon at the rate of Four per centum per annum, payable half-

yearly on the first day of January and the first day of July in each year, in like Gold Coin, both principal and interest payable at the office of the Treasurer of the City of Portland, Oregon, on the presentation and surrender of this bond, or of the annexed coupons as they severally become due.

This bond is one of a series of bonds of like tenor and date which the said City of Portland has issued for the purpose of providing a fund for the construction of a bridge with its approaches, terminals, piers, abutments and supports across the Willamette River in said City, from a point at or near the intersection of Broadway and Larrabee Street on the east side of said River and following the line of Broadway Street, extended westerly in its present course, to a point at or near its intersection with Seventh Street on the west side of said river; thence southerly and easterly to a point at or near the intersection of Sixth and Irving Streets in said City (the west approach and incline of said bridge being subject to modification and change by the Executive Board or its successors, of said City), and the issuance of said bonds and all of such bonds is by virtue of and in full and strict accordance and compliance with all of the provisions of an Amendment to the Charter of the City of Portland, entitled, "An Act to amend Article VI of Chapter III of the Charter of the City of Portland, entitled, 'An Act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a Charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State, January 23, 1903, by inserting a section in said Article VI of Chapter III after Section 118 and before Section 119 thereof, which shall be designated in the Charter as Section One Hundred Eighteen and One-half (118½) of Article VI of Chapter III," adopted by the electors of the City of Portland on the 7th day of June, 1909. And it is hereby certified and recited that all acts and things required to be done precedent to the issuance of these bonds have been properly done and performed in regular and due time, form and manner as required by law, and that the total debt of the City of Portland, including these bonds, does not exceed the statutory nor constitutional limitation of indebtedness. And for the punctual pay-

100 ment at maturity of the principal and interest of this bond, the faith and credit of the City of Portland are hereby irrevocably pledged.

In testimony whereof, the Council of the City of Portland, by its Ordinance duly adopted, has caused this bond to be signed by the Mayor and countersigned by the Auditor of the City of Portland, and has caused the corporate seal of the said city of Portland to be hereto affixed this first day of July, A. D. 1909.

Countersigned.

— — —, Mayor.

— — —,
Auditor of the City of Portland.

United States of America.

* * * * *

SECTION 3. That the following be and the same is hereby approved and declared to be the form of the coupons to be attached to said Bridge Bonds of the City of Portland, Series 1909:

"\$———.

On the first day of —— A. D. 19——, the City of Portland in the County of Multnomah, State of Oregon, will pay to the bearer — Dollars in Gold Coin of the United States of America, at the office of the Treasurer of the City of Portland, Oregon, being six months' interest on Bridge Bond of the City of Portland, Series 1909, No. —.

JOSEPH SIMON, *Mayor*.

Attest:

A. L. BARBUR,

Auditor of the City of Portland."

SECTION 4. That the Auditor of the City of Portland be and he is hereby directed to advertise for proposals for the purchase of Bridge Bonds of the City of Portland, Series 1909, provided by this Ordinance, and that said bonds be advertised by him for a period of thirty days in the City Official Newspaper of the City of 101 Portland, and by at least one insertion in a financial newspaper of the City of New York, the first insertion of said advertisement in said official newspaper of the City of Portland and in said financial newspaper of the City of New York to be at least thirty days before the time fixed for opening said proposals, and to state in said advertisements that said bonds shall be sold to the highest responsible bidder for cash, and that the Council reserves the right to reject any and all bids tendered therefor.

SECTION 5. Inasmuch as this ordinance is necessary for the immediate preservation of the public health, peace and safety of the City of Portland and the inhabitants thereof in this: That said city has not at this time adequate facilities for crossing the Willamette River; that the travel and traffic across the present bridges over said river are congested and constitute menace to life and property, therefore an emergency is hereby declared and this ordinance shall go into force and effect from and after its approval by the Mayor.

Passed the Council, October 27th, 1909, by the following vote:

Ayes 14.

Nays None.

A. L. BARBUR,

Auditor of the City of Portland.

Submitted to the Mayor, October 27, 1909.

Approved October 27th, 1909.

[City of Portland Seal.]

JOSEPH SIMON, *Mayor*.

102 STATE OF OREGON,
County of Multnomah,
City of Portland, ss:

I, A. L. Barbur, Auditor of the City of Portland, do hereby certify that I have compared the foregoing copy of Ordinance No. 2020 providing for issuance and sale of bonds for the construction of the Broadway Bridge, with the original thereof, and that the same is full, true and correct transcript of such original Ordinance No. 20208 and of the whole thereof as the same appears on file and record in my office, and in my care and custody.

In witness whereof, I have hereunto set my hand and the seal of the City of Portland affixed this 20th day of May, 1910.

[City of Portland Seal.]

A. L. BARBUR,
Auditor of the City of Portland,
 By C. L. WIEGAND, *Deputy.*

103 *Extract from the Record of the Port of Portland Commission*

Case No. 7329.

Drawer No. 812.

The Chairman announced the purpose of the meeting to be consideration of the application of the Executive Board of the City of Portland for approval of the plans and construction of the proposed Broadway Bridge.

The Chairman stated to the Board that the act adopted by the people at the June election, 1909, authorizing the construction of what is known as the Broadway Bridge provided that the Executive Board of the City of Portland "shall have full power and authority, subject to such regulations as may be imposed by the United States, to build, erect and construct piers, abutments and other necessary supports in the bed of the Willamette River for the foundation of such bridge, and the City Attorney having expressed the opinion that action on the part of this Commission was unnecessary, the Chairman therefore suggested that no action be taken on the application presented to this Commission by the Executive Board of the City of Portland for the approval of the plans for said bridge.

It was thereupon, on motion duly made and seconded, voted that further consideration of this subject by the Commission be indefinitely postponed.

I hereby certify that the foregoing is a true and correct copy from the record of the Port of Portland Commission of a meeting held January 11, 1910.

JOHN P. DOYLE,
Clerk of the Board.

[Port of Portland Seal.]

104-123 STATE OF OREGON,
County of Multnomah,
City of Portland, ss:

I, A. L. Barbur, Auditor of the City of Portland, do hereby certify that I have compared the foregoing copy of resolution adopted November 25, 1908, submitting to the people amendment to Charter providing for the issuance and disposal of bonds in an amount not exceeding two million dollars to be used for the purpose of constructing a new bridge across the Willamette River from Broadway to a point at or near Sixth and Irving Streets, with the original thereof, and that the same is a full, true and correct transcript of such original resolution adopted November 25, 1908, and of the whole thereof, as the same appears on file and of record in my office, and in my care and custody.

In witness whereof, I have hereunto set my hand and the Seal of the City of Portland affixed this twelfth day of August, 1910.

A. L. BARBUR,
Auditor of the City of Portland,
 By C. F. WIEGAND, *Deputy.*

[Port of Portland Seal.]

* * * * *

124-131 The COURT: As I view this case, gentlemen, the plaintiff is required to prove, in order to sustain his case, only that his client is a property owner in the City of Portland, subject to taxes and payment of obligations; and also that the measure known as 118½ was not filed with the auditor.

Mr. KAVANAGH: On behalf of the defendant we will admit of record that the plaintiff is a resident and tax-payer of the city of Portland.

The COURT: Very well then you admit the first allegation in the amended complaint.

The following stipulation was thereupon entered into:

At the time of the general municipal election held in the City of Portland, Oregon, June 7, 1909, there were 33,041 duly registered voters in said city. At said election there was a total vote cast of 17,935 votes. On the official ballot at said general municipal election held June 7, 1909, in the City of Portland, the following quoted measure appeared to-wit:

"\$2,000,000 bridge bonds to be authorized to construct a high bridge across the Willamette River from Broadway and Larrabee Streets on the East Side, following the line of Broadway Street extended westerly in its present course to a point at or near its intersection with Seventh Street on the West side, by an amendment to article 6, chapter 3 of the charter of the city of Portland, by inserting therein a new section to be known as section 118½. Shall Article 6, chapter 3 of the charter of the City of Portland be amended by inserting section 118½. 152 yes. 153 no." And at said elec-

tion there were 10,078 votes cast, "152 Yes, upon said ballot in favor of said measure; and 6,061 votes cast "153 no" against said measure.

* * * * *

132 A. L. BARBOUR, Sworn on part of Plaintiff.

Direct examination.

By Mr. DUNIWAY:

Q. You are the auditor of the City of Portland, are you not?

A. Yes sir.

Q. I will call your attention to this printed pamphlet and ask you how many of those were printed by the city for the election?

Objected to as immaterial.

Objection sustained.

Plaintiff allowed an exception.

The COURT: Come to the point Mr. Duniway. The court has indicated its opinion on that matter, and if you meet that suggestion it will be all sufficient.

Q. Have you an application that was made to the secretary of way for a permit?

A. No sir, I do not think we have anything of that kind on file.

Q. Have you the permit that was granted by the government?

A. Yes sir.

Q. Can I see that please?

A. That is it (Handing paper to counsel).

Mr. DUNIWAY: We wish to offer this original with permission to bring in a certified copy to show the only permit that was granted by the federal government on this matter.

Mr. FULTON: It cannot be the only permit.

Q. Is that the only permit that was granted by the federal government?

A. So far as I know.

Q. You are a custodian of the records of the city?

A. Yes sir.

Q. Who prepared the application that was made for a permit, if you know?

133 A. I do not know; I do not remember that now.

The same was admitted without objection and marked Plaintiff's Exhibit F.

(Excused.)

134 J. P. DOYLE, Sworn on part of Plaintiff.

Direct examination.

By Mr. DUNIWAY:

Q. Are you a clerk of the Port of Portland?

A. I am.

Q. Have you with you the application that was made by the City

of Portland for a franchise to the Port of Portland on this Broadway Bridge?

A. Yes sir.

Q. Will you please let me see it?

A. That is the document with the blue print accompanying the application.

Mr. DUNIWAY: We will offer them in evidence.

Objected to as immaterial.

Objection sustained and exception allowed.

The same were received subject to the objection and marked Plaintiff Exhibit G rejected.

The COURT: You should have certified copies of all these public records.

Mr. DUNIWAY: We will ask permission to have certified copies prepared.

Q. Have you the journal of the Port of Portland showing the action of the Port of Portland thereon?

A. I have.

Mr. DUNIWAY: I wish to offer the original and substitute a certified copy.

Objected to as immaterial.

Objection sustained and plaintiff allowed an exception.

The paper was marked Plaintiff's Exhibit H rejected.

(Excused.)

135-149 D. W. TAYLOR, sworn on part of plaintiff.

Direct examination.

By Mr. DUNIWAY:

Q. Were you city engineer of the City of Portland prior to June 7, 1909?

A. Yes sir, from September 1, 1905, to July 15, 1909.

Q. I will ask you to state what, if any, survey you made as city engineer for the piers of the Broadway Bridge?

Objected to as immaterial.

Objection sustained.

Plaintiff allowed an exception.

Mr. DUNIWAY: We wish to offer to show that there was no survey made by the City of Portland to ascertain the location or the feasibility of this bridge prior to the election of June 7, 1909.

The COURT: Mr. Duniway, the court has indicated its action on this matter, and allowed you to prove, if you can, that the measure, which they call section 118½ was not in existence and never filed with the auditor. The court will restrict your proof to that matter.

Mr. DUNIWAY: Very well, under the ruling of the court, I close my testimony and ask an exception to being restricted so closely.

Exception allowed.

(Excused.)

(Plaintiff rests.)

* * * * *

150 In the Supreme Court of the State of Oregon.

FRANK KIERNAN, Appellant,

vs.

CITY OF PORTLAND et al., Respondents.

Appeal from the Circuit Court of Multnomah County.

The Honorable George H. Burnett, Judge.

Argued and submitted October 20, 1910.

Ralph R. Duniway, Attorney for Appellant.

Frank S. Grant, City Attorney; W. C. Benbow, Deputy City Attorney; C. W. Fulton, M. L. Pipes and H. H. Riddell, Attorneys for Respondents.

McBRIDE, J.: Affirmed.

Filed Nov. 1, 1910.

J. C. MORELAND,

Clerk of the Supreme Court,

By ———, *Deputy.*

151 Art. V, §§ 75 to 92 inclusive, of the city charter, provides the method by which the City of Portland may construct or acquire public utilities, including bridges, but prohibits the city from entering into any contract for such purpose until the question is first submitted to the vote of the electors.

On April 7, 1908, an initiative petition, containing the required number of signatures, was filed with the council, requesting the city to build a bridge across the Willamette river, from Broadway street in East Portland to the west side of the river, whereupon the City of Portland took steps to obtain plans and specifications for building said bridge. On May 8, 1908, the auditor notified the mayor of the filing of said petition, and requested him to comply with his duties under the charter in regard thereto. On October 20, 1908, the petition, containing a sufficient number of signatures, was presented to the council at a legally called meeting, and at said date the council requested the opinion of the city attorney as to the validity thereof. On October 27, 1908, the attorney filed his opinion, affirming its validity, and thereafter, on November 11, 1908, the council passed an ordinance (No. 18,531) submitting to a vote of the people an amendment to the city charter, providing for the construction of said bridge and for issuing bonds in the sum of not to exceed \$2,000,000.00 to pay for the same, designating said proposed amend-

ment as § 118½ of Art. VI of Chap. 3, and on November 25, 1908, the council passed a resolution, submitting the proposed amendment to a vote of the people at a special election on April 23, 1909. Thereafter, on February 17, 1909, the council passed an ordinance (No. 18,976), amending ordinance No. 18,531, so as to fix the date of the election on May 8, 1909, instead of April 23, as originally specified. On March 31, 1909, the council passed an ordinance (No. 19,174) expressly repealing ordinance No. 18,531 as amended, and no special election was held under any ordinance or resolution. On March 31, 1909, the same date as that of the repealing ordinance, a resolution was passed, authorizing the submission of the charter amendment to a vote of the people at the general election to be held June 7, 1909. More than twenty days prior to the election the auditor of the city published the proposed charter amendment, with the ballot in full, in the city's official newspaper, as required by law, and also sent out and distributed copies of said amendment to the voters of the city. On June 7th the election was held, at which there
152 were cast for the amendment 10,087 votes, and against it 6,061, and on June 21st the mayor proclaimed that the amendment had been adopted. On October 27, 1909, the council passed an ordinance (No. 20,208), authorizing the issue and sale of bonds to build the bridge, and thereafter plaintiff, a taxpayer of the city, brought this suit to enjoin the sale of such bonds, alleging ordinance No. 20,208, to be void, by reason of the fact that the alleged charter amendment (§ 118½) was not properly enacted. Upon trial in the court below the plaintiff's suit was dismissed, and defendant had a decree for costs. Plaintiff appeals.

McBRIDE, J.: Viewed in the light of our Constitution and the ordinance of the City of Portland, passed in pursuance thereof, the validity of § 118½ of the city charter seems clear. Art. XI, § 2, of our constitution, as amended June 4, 1906, is as follows: "The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the State * * *." In *Aeme Dairy Co. Astoria*, 49 Or., 520, we held this provision not to be self-executing, and that in the absence of the legislation to the contrary the city council might, by ordinance, order an initiative measure to be submitted to the voters. Pursuant to this decision the city council on March 26, 1907, passed ordinance No. 16,311, commonly known as the "McNary ordinance," providing for the submission of initiative measures to the people, and the present measure, having been regularly before them, they passed ordinance No. 18,531, submitting the same and fixing the date for the election on April 23, 1909. Later, presumably in order to have such special election coincide with the general primary election, another ordinance was passed, amending the previous ordinance, and fixing the date on May 8, 1909. Still later, on March 31, 1909, some doubt having arisen as to the validity of the election on the date last mentioned, an ordinance, repealing the original ordinance as amended, was passed, and at the same meeting a resolution was adopted, submitting the amendment to the voters at the general election to be held June 7, 1909.

The McNary ordinance provides that initiative petitions for charter amendments shall be fixed not later than the sixtieth day before the election at which they are to be voted on, and also provides that the council itself may submit proposed amendments without an initiative petition, but that the same shall be filed with the
153 auditor not later than sixty days before the election. The evidence is clear, and is not denied, that the present measure was on file with the auditor from the time of the presentation of the initiative petition, and it would seem clear that whether we regard it as a measure initiated by petition, or as a measure proposed by the council, the requisites of the law as to filing have been substantially complied with, and that the measure was entitled to go upon the ballot. Counsel for plaintiff attempts to draw a distinction—that the original filing was with the auditor, acting in his capacity as clerk of the council, and not in his capacity as general auditor and clerk of the city, but no such distinction is made in the law. No good reason exists for requiring several filings of the same paper with the same officer, simply because the duties of his office are divided into several departments. In fact there is but one office and one officer with one title, namely city auditor.

The contention that the repealing ordinance of March 31st did not repeal ordinance No. 18,976 is unsound. The ordinance last mentioned did not destroy ordinance No. 18,531, but merely amended it by changing a date from April 23 to May 8. As amended it was in full force, and when on March 31 an ordinance was passed repealing it "as amended" the whole ordinance, including amendments, was wiped out if not directly at least by implication. Nor does the fact that the repealing ordinance could not take effect for thirty days take away from the council the power to pass a resolution to submit the charter amendments to a vote at the June election. They had a right, and it was their duty, to provide for a contingency, which, in the natural course of things, would arise upon the expiration of the thirty days. Laws predicated upon future contingencies are not unusual.

The contention that the resolution submitting the amendment to a popular vote is uncertain and does not identify the amendment cannot be upheld. We have carefully compared the amendment with the resolution, and are certain that any person capable of reading and understanding the English language would instantly identify them as related to the same subject matter and to each other. While the law does not in terms require that an initiative measure shall have a title, it does not prohibit a title, and if one is affixed it may be used for the purposes of identification, and in the present case we think the amendment sufficiently identified, both by reference to the title and to the subject matter.

154 The alleged differences between the description of the proposed bridge in the resolution and ballot title are too microscopic to have misled anyone.

Plaintiff also contends that the failure of the auditor to have the words "charter amendment submitted by the council" printed upon the ballot, rendered the election void. It may be conceded that these

words should have been printed upon the ballot, and that the ordinance requiring this to be done is in a sense mandatory upon the officers charged with the duty of preparing the ballot, but it does not follow that a failure in this respect renders the election void. The omission could have misled nobody, as the important question for the voter to decide was not who introduced the measure, but what its real merits were. Courts should hesitate to disfranchise ten thousand voters because of the neglect of an officer to comply with a technical and comparatively unimportant provision of the law, unless it can be seen that the effect of such negligence might have been to change the result of the election. Following the doctrine above announced courts have frequently held statutes, containing provisions similar to the one invoked by plaintiff in this case, to be merely directory as to the voter. *Jones v. State*, 153 Ind., 440; 55 N. E., 229; *Patton v. Watkins*, 131 Ala., 387; 90 Am. State, 43; *Maxwell Int. Stat.*, 556, 557.

The same answer may be made to the contention that the transposition of the ballot numbers in the voters' pamphlet rendered the whole proceeding void. The law provides substantially that the affirmative shall be designated by the even numbers, and the negative by the odd, but in printing the ballot title in the voters' pamphlet the negative was placed after the even number and the affirmative after the odd. In all other respects the ballot title corresponds with that actually printed upon the ballot. Ordinarily this might be misleading, but in the present case could not possibly be so. We here give the ballot title, omitting that part descriptive of the measure:

"Shall Article VI, of Chapter III of the charter of the City of Portland be amended by inserting Section 118½?"

.....
152 Yes.

.....
153 No.

.....
The words "yes" and "no" were printed in large Roman type, showing much more conspicuously than the figures, and were the very things that indicated to the voter where to mark his ballot. The mistake misled nobody, and was immaterial.

155 It is also urged that the amendment is void because it provides that upon completion of the bridge the executive board shall surrender and deliver the possession thereof to the county court of Multnomah county. We agree with counsel that it is beyond the power of the city to impose the care and maintenance of a public bridge upon Multnomah county without the county authorities shall consent thereto, and that so far as this clause of the amendment goes beyond giving a mere permission to do so, it is void, but it does not follow that the whole amendment is void merely because one clause, easily separable from the rest, is ineffective. *Simon v. Northup*, 27 Or., 487; *Pac.*, 560.

The contention that no permission has been obtained from the War Department is negatived by the evidence, and even if this were not so, the plaintiff does not stand in such a relation to the subject matter as to be able to raise the question, which is one to be settled between the government authorities and the city. The objection that no permission has been received from the Port of Portland may be answered in the same way. *Kundinger v. City of Saginaw*, 132 Mich., 396.

In addition to this we have been cited to no statute requiring the city to obtain the permission of the Port of Portland before constructing bridges over the Willamette river. This corporation is authorized to remove obstructions, to deepen the channels, and generally to have control over the river for the purpose of facilitating and protecting commerce, but it may well be doubted whether this grant of power was ever intended to authorize it to act as sole judge as to when and where and how a great city shall erect bridges over a water-way exclusively within its own limits. Section 76 of the charter of 1903 authorizes the city to acquire, construct and maintain bridges and ferries, and this could have no application to any bridges or ferries except over the Willamette river. In the emergency clause to the same charter the necessity for constructing new bridges is enumerated. The power to construct bridges having been given, the next question is as to the manner of its exercise. The people of this state, by the constitutional amendment heretofore quoted, have seen fit to confer upon municipal corporations the right to enact their own charters, the only limitation upon that right being that such charters shall not conflict with the constitution or the criminal laws of this state. We take it, therefore, that within the

limits of the municipality, and for those purposes which are purely material the City of Portland may include in its charter by amendment any provision or right that the legislature might have granted before the constitution was so amended. This being so, there is fair ground for the contention that the city may, by amendment to its charter, obtain the right to locate a public bridge over the Willamette river at any point where such river is exclusively within the municipal boundaries, which is the case here.

We find no error in the record, and the decree of the circuit court is affirmed.

157 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the courtroom in the City of Salem, on the first Monday the 3d day of October 1910.

Whereupon on this Tuesday the 1st day of November 1910 the same being the 9th judicial day of said term, there were present:

Hon. Frank A. Moore, Chief Justice;
 Hon. Robert Eakin, Associate Justice;
 Hon. Thomas A. McBride, Associate Justice;
 Hon. Woodson T. Slater, Associate Justice;
 Hon. William R. King, Associate Justice, and
 J. C. Moreland, Clerk,

when the following proceedings were had:

FRANK KIERNAN, Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation; JOSEPH SIMON,
Mayor of the City of Portland; A. L. Barbur, Auditor of the City
of Portland, and Joseph Buchtel, Respondents.

Appeal from Multnomah County.

This cause having on the 20th day of October 1910, been duly tried, argued and submitted to the court upon and concerning all the questions arising upon the transcript, record and evidence, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds that there is not error as alleged. It is therefore ordered, adjudged and decreed by the court that the decree of the court below in this cause rendered and entered be and the same is in all things affirmed.

And the court having examined the allegations of the parties and the evidence submitted, finds that the equity of the case is with the respondents and that appellant has failed to make a case entitling him to any relief or to an injunction. It is therefore ordered, adjudged and decreed by the court that the plaintiff's complaint and suit in this case be and it is dismissed.

And the said appellant having given an undertaking 158-203 on appeal and also as a stay, with Thomas Scott Brooke as surety, it is further ordered that the respondents recover *off* and from the appellant and his said surety their costs and disbursements in the court below taxed at \$15.00, and also their costs and disbursements in this court taxed at \$—.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken with directions to enter a decree in accordance herewith.

* * * * *

204 In the Supreme Court of the State of Oregon.

FRANK KIERNAN, Appellant,

vs.

CITY OF PORTLAND et al., Respondents.

Appeal from the Circuit Court of Multnomah County.

The Honorable George H. Burnett, Judge.

On Petition for Rehearing.

For former opinions see 111 Pacific, 379, 382.

Ralph R. Duniway, Attorney for Appellant.

Frank S. Grant, City Attorney;

W. C. Benbow, Deputy City Attorney;

C. W. Fulton, M. L. Pipes, and H. H. Riddell,

Attorneys for Respondents.

KING, J.: Denied.

(Endorsed:) Filed Dec. 31, 1910. J. C. Moreland, Clerk of the
Supreme Court.

205

KING J.: The principal point suggested by the petition for rehearing is the contention that the people of Oregon have no power, by constitutional provision or otherwise, to deprive the Legislature of the sovereign power to enact, amend, or repeal a charter or act of incorporation for any city or town, and any attempt so to do is void. The constitutional provisions, amended by article 11, adopted in June, 1906, known as the "Charter Amendments," are as follows:

"SECTION 1a. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for their manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum, nor more than fifteen per cent. to propose any measure, by the initiative, in any city or town.

"SEC. 2. Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of Oregon."

It will be observed from the first sentence in section 2 that no restriction is placed upon the Legislature with respect to the enactment of general laws; the exception being that no special laws creating or affecting the municipalities shall be enacted by the Legislature. Under all the rules of construction, this exception reserves to the legislative department the right, whether by the people directly through the initiative, or indirectly through the Legislature, to enact general laws upon the subject, making it clear that the inhibition in the next sentence has reference to special laws.

In *Farrell v. Port of Portland*, 52 Or. 582, 586, 98 Pac. 1, it is held that the initiative amendments to the Constitution, bearing upon the creation and government of municipalities, including section 1 of article 11, must be construed together. In considering the effect of section 2, art. 11, it is there said: "But this section and the language used in it should not be construed alone. It is a part of the initiative and referendum scheme first inaugurated by the amendment of 1902, and subsequently enlarged and extended by the amendments of 1906. All these amendments, so far as they refer to the same subject-matter, should be read together, and be so interpreted."

preted as to carry out the purpose of the people in adopting them, regardless of the technical construction of some of the language used." Since the above is the rule regarding the various amendments taken as a whole, much stronger must be the reason for reading and construing together all the sentences in the one section, from which it is obvious that the only restriction placed upon the Legislature by section 2 pertains to the passage of special laws affecting municipalities. These agencies of the state are thereby enabled to enact such local measures, to revise existing local laws, and to exercise their powers affecting them, and thus carry out their general scope and purpose, so long as they are not inconsistent with the Constitution of the state, or of the United States, and are in harmony with all the special laws and general laws of the state constitutionally enacted. *Straw v. Harris*, 54 Or. 424, 443, 103 Pac., 777. The language following the above excerpt from page 587 of 52 Or., 98 Pac. 145, of the opinion in *Farrell v. Port of Portland*, concerning the limitations placed by the amendment upon the Legislature, must be interpreted in the light of the questions there under consideration, from which it is manifest reference was had only to special laws affecting municipalities. The so-termed "general initiative and referendum scheme," there alluded to, and whether it is in violation of this provision of the federal Constitution, is fully considered and determined adversely to petitioner's contention in *Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, and *State v. Pacific States Tel. & Tel. Co.*, 53 Or. 163, 99 Pac. 427, and there held to be not in conflict or inconsistent therewith. Other cases impliedly if not expressly sustaining this position are: *Farrell v. Port of Portland*, 52 Or. 582, 98 Pac. 145; *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *Haines v. City of Forest Grove*, 54 Or. 443, 103 Pac. 775; *State v. Langworthy*, 104 Pac. 424.

The question, however, as to whether the people may, by constitutional amendment, reserve to themselves the right to enact any law to the exclusion of the Legislature, and, by such method, delegate to municipalities powers not subject to abridgment, change, limitation, or recall by special acts of the legislative assembly, was not directly involved in any of the cases above cited. It would seem, however, that the views and conclusions reached in the decisions named necessarily dispose of this feature, but since counsel for petitioner insists that such disposal has not been made, and presents his contention in good faith, we will, at the possible expense of repetition of views announced in the above cases, consider the points thus presented. To begin, article 4, § 4, Const. U. S., reads: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence." In *Luther v. Borden*, 7 How. 1, 48, 12 L. Ed. 581, the court observes: "Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed

the power in the hands of that department. The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the Legislature or of the executive (when the Legislature cannot be convened) against domestic violence. Under this article of the Constitution, it rests with Congress to decide what government is the established one in a state. For as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." See, also, *Cooley*, Const. Lim. (6th Ed.) pp. 42, 45; *Texas v. White*, 7 Wall. 700, 730, 19 L. Ed. 227; *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187, and 6 Mich. Law Review, 304, where authorities sustaining the above view are collated. We have an illustration of the principles announced in *Luther v. Borden* in the admission of Oklahoma as a state. Before its statehood was recognized, Oklahoma had adopted, as a part of its Constitution, the initiative and referendum lawmaking system, patterned after the Oregon plan, regardless of which its senators and representatives were "admitted into the councils of the Union," and "the authority of the government under which they were appointed, as well as its republican character, is recognized by the proper constitutional authority," thus determining that state, with its comparatively new legislative system, to be republican in form. This recent historical precedent should in itself be adequate to set at rest the temporarily mooted question in hand.

This court, however, has heretofore taken jurisdiction of cases of this character (*Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *State v. Cochrane*, 105 Pac. 884), and, owing to the importance of the points presented, we will proceed to a consideration thereof. To ascertain whether taking from the Legislature and delegating to the municipalities, or to the localities affected, local self-government, or right to enact, maintain, and alter their charters as the Legislature formerly did, and whether the taking from the Legislature the right to make special laws upon the subject violates this provision of the national Constitution, makes it important that we first ascertain what is meant by a republican form of government. It is an expression which all assume to understand, yet, judging from the many unsuccessful attempts of eminent statesmen and writers to give it a clear meaning, it would seem the phrase is not susceptible to being given a precise definition. Especially is this true when sought to be applied to the Constitution of different states, concerning which Mr. James Madison, a member of the Constitutional Convention, said: "* * * If we resort for a criterion to the different

principles on which different forms of government are established, we may define a republic to be, or may at least bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by 207 persons holding their offices during pleasure for a limited period or during good behavior. It is essential to such government that it be derived from the great body of society, and not from any inconsiderable portion or a favored class of it. * * *

The Federalist (Hamilton Ed.) paper 39, p. 301. Another and more pointed definition appears in *Chisholm v. Georgia*, 2 Dall. 419, 457, 1 L. Ed. 440, by Mr. Justice Wilson, a member of the Constitutional Convention, who, but a short time after the adoption of the federal Constitution, in adverting to what is meant by a republican form of government, remarked: "As a citizen, I know the government of that state (Georgia) to be republican, and my short definition of such a government—one constructed on this principle, that the supreme power resides in the body of the people." From which it follows that the converse must be true; that is to say, any government in which the supreme power resides with the people is republican in form. See, also, Mr. Justice Wilson's remarks to the same effect, reported in 5 Elliott's Debates, 160.

Measured in the light of the above, it is difficult to conceive of any system of law-making coming nearer to the great body of the people of the entire state, or by those comprising the various municipalities, than that now in use here, and, being so, we are at a loss to understand how the adoption and use of this system can be held a departure from a republican form of government. It was to escape the oppression resulting from governments controlled by the select few, so often ruling under the assumption that "might makes right," that gave birth to republics. Monarchical rulers refuse to recognize their accountability to the people governed by them. In a republic the converse is true. The tenure of office may be for a short or a long period, or even for life, yet those in office are at all times answerable, either directly or indirectly, to the people, and in proportion to their responsibility to those for whom they may be the public agents, and the nearer the power to enact laws and control public servants lies with the great body of the people, the more nearly does a government take unto itself the form of a republic—not in name alone, but in fact. From this it follows that each republic may differ in its political system or in the political machinery by which it moves, but, so long as the ultimate control of its officials and affairs of state remain in its citizens, it will in the eye of all republics be recognized as a government of that class. Of this we have many examples in Central and South America. It becomes then a matter of degree, and the fear manifested by the briefs filed in this case would seem to indicate, not that we are drifting from the secure moorings of a republic, but that our state, by the direct system of legislation complained of, is becoming too democratic—advancing too rapidly towards a republic pure in form. This, it is true, counsel for petitioner does not concede, but under any interpretation of which the term is capable, or from any view thus far found ex-

pressed in the writings of the prominent statesmen who were members of the Constitutional Convention, or who figured in the early upbuilding of the nation, it follows that the system here assailed brings us nearer to a state republican in form than before its adoption. Mr. Thomas Jefferson, in 1816, when discussing the term republic, defined and illustrated his view thereof as follows: "Indeed it must be acknowledged that the term 'republic' is of very vague application in every language. Witness the self-styled republics of Holland, Switzerland, Genoa, Venice, Poland. Were I to assign to this term a precise and definite idea, I would say, purely and simply it means a government by its citizens in mass, acting directly and not personally, according to rules established by the majority, and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens." Writings of Thomas Jefferson vol. 15, p. 19. It is well known that at the time of the adoption of the federal Constitution there existed in some of the Atlantic states a system of local government, known as "New England towns," in which the people had the right to legislate upon various matters, the masses assembling at stated periods for that purpose, all of which was within the knowledge of those composing the Constitutional Convention. After observing that a true republic, under his definition, would necessarily be restrained to narrow limits, such as in a New England township, and that the next step in use at that time was through the representative system, Mr. Jefferson pointed out that the further the officials of state or nation are separated from the masses proportionately less does such state or government retain the elements of a republic, and on page 23 concludes: "On this view of the import of the term 'republic,' instead of saying, as has been said, that it may mean anything or nothing, we may say with truth and meaning that governments are more or less republican, as they have more or less of the element of popular election and control in their composition; and believing, as I do, that the mass of citizen is the safest depository of their own rights and especially, that the evils flowing from the duperies of the people, are less injurious than those from the egoism of their agents, I am a friend to that composition of government which has in it the most of this ingredient. The observations quoted are in full accord with the recorded view of all the writers and statesmen of that time, when the intention of the framers of our national Constitution was fully understood, in the light of which it seems inconceivable that a state, merely because it may evolve a system by which its citizens become a branch of its legislative department, co-ordinate with their representatives in the Legislature, loses caste as a republic. The extent to which a Legislature of any state may enact laws is and always has been, one of degree, depending upon the limitation prescribed by its Constitution; some Constitutions having few and others many limitations. But in all states, whatever may be the restriction placed upon their representatives, the people, either by constitutional amendment or by convention called for that purpose have had, and have, the power to directly legislate, and to change al

or any laws so far as deemed proper—limited only by clear inhibitions of the national Constitution. Cooley, Const. Lim. (6th Ed.) 44.

An examination of our State Constitution, as first adopted, discloses many restrictions upon the lawmaking department, among which is a provision to the effect that no amendment thereto should be submitted to the people for ratification until after it passed two successive sessions of the Legislature. In course of time, an amendment under this provision was legally submitted and adopted by a majority vote of the people, by which the people reserved the right to change the Constitution or any part thereof without awaiting this legislative formality, the validity of which is not open to doubt. Is it not possible, indeed, is it not practicable, then, for the people further to restrict the power of their representatives to legislate upon matters of public interest, and in so doing are they not, and even under the old system were they not, directly legislating? This system of direct legislation has been in common use throughout the various state governments since their inception, but until the adoption of the initiative and referendum amendments no one was heard to assert that an amendment to the Constitution of a state merely because of depriving the Legislature of some lawmaking power or powers held by it at the adoption of the national Constitution was void on the grounds of being inconsistent with a republican form of government. The absurdity of such a contention, if made, would at once be obvious. But, viewed from any standpoint, such is the logical sequence of appellant's contention to the effect, that because the people have, by constitutional amendment, reserved the exclusive right to enact special laws concerning municipalities, and by constitutional amendment have delegated to municipal corporations the right to exercise such powers as before were only within the province of their representatives, through the Legislature, to delegate, violates the provision of the federal Constitution, guaranteeing to our state a republican form of government. In other words, it is argued that the right of the city of Portland to legislate upon matters of municipal concern, to provide for the exercise of its right of eminent domain, to build bridges, etc., would be in harmony with the above provision of the federal Constitution, if delegated by the people through their representatives, but not so if done directly by them through the initiative. In brief, the effect of this argument is that the people may legally do indirectly by the mere enactment of a law what they cannot do directly by constitutional amendment. The statement of this contention should be sufficient for its answer.

We held in *Straw v. Harris*, 54 Or. 424, 103 Pac. 777, that a state could not by amendment of its fundamental laws or otherwise, except in the manner provided in section 3, art. 4, Const. U. S., delegate to any municipality or subdivision of the state prerogatives not subject to recall, that so to do would, in effect, be the creation of a state within a state, and that, so long as the Legislature is not precluded by the Constitution from enacting general laws affecting them, it may by that method amend, modify, or even abolish municipal corporations, and that even should this power be removed from

the Legislature there must remain with the people a right to do so, if not by enacting a law to that effect, then by the former system of direct legislation, consisting in the adoption of amendments to the Constitution, known as the fundamental laws of the state, and that this right of state government to retain control of these agencies and departments of state cannot be surrendered, but must always remain somewhere within the reach of that source of all power—the people. We held, and still hold, to this view, not on the ground that to hold otherwise would be destructive of a republican form of government, but because to do so would in effect permit a state within a state and accordingly violate section 3, art. 4, of the federal Constitution, the first paragraph of which reads: "New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the Legislatures of the states concerned, as well as of the Congress." Suppose our lawmaking department should pass an *ex post facto* act, or a bill of attainder, such purported laws would be void, not because of being subversive of a republican form of government, but by reason of some express inhibition against legislation of that character contained in another section of the federal Constitution. If the national Constitution permitted or provided for the creation of a state within a state, could it be said that by reason thereof the state thus created would be un-republican in form? Under section 3 of article 4, above quoted,

states may be divided and new ones created, the limitation
 209 being that no state shall be created within a state, but the creation of new states under that section has never been considered an un-republican step. Should our state attempt to surrender its powers to an executive for life, with the provision that upon his death his authority should pass by entailed inheritance to his son or other relative, and at the same time, by constitutional change or otherwise, further surrender any right to alter the system, except with the consent of such executive, it would lose its republican form, and in effect become a local monarchy within the Union, thereby furnishing an example of a violation of section 4, art. 4, of the federal Constitution. But, so long as the people retain the power within themselves to conduct and manage the affairs of state—either directly or indirectly—a republican form of government is maintained, and comes within the provision of the federal Constitution guaranteeing the same, being circumscribed in its powers only by the provisions of such Constitution. The effect of petitioner's contention is that any attempt on the part of the state to enact and enforce a law which may be in conflict with any provision of the national Constitution is not void because in conflict or inconsistent with the special provision violated, but because it deprives the state of its republican form of government, and this seems to be the character of reasoning adopted by the majority in *People v. Johnson*, 34 Colo. 143, to which we are cited as sustaining petitioner's view. In that case the question was whether the consolidation of the city and county of Denver, the boundaries of which were

made coterminous, abolished the city government, as distinguished from county government, thereby giving to such organization home rule to the extent of permitting it to do as the constitutional amendment of 1902 provided might be done—enact all local laws, and elect such officers at such times as deemed advisable, concerning which it was held by the majority that the city and county governments, although covering the same territory, remained separate and distinct, requiring different officers to be selected for each, and in a different manner, as before the change. The reason for the conclusion appears to be on account of other provisions in the Constitution of Colorado, the majority not recognizing the rule invoked without exception in all other jurisdictions, including ours, that Constitutions with amendments must be construed as a whole, and that when two constructions are possible, one of which takes away the meaning of a section, and another giving effect to all the provisions, the latter must prevail. *State v. Cochrane*, 105 Pac. 884; *Farrell v. Port of Portland*, 52 Or. 582, 98 Pac. 145. In an able and exhaustive dissenting opinion in that case by Mr. Justice Steele, concurred in by Mr. Justice Gunter, it is made clear that a federal question (such as here presented) was not involved; that the 1902 amendment of Colorado's Constitution was not inconsistent with section 4, art. 4, of the federal Constitution. After demonstrating that the conclusion announced by the majority "overlooks the fundamental rule in the construction of Constitutions and statutes that a special provision controls the general one and that both may stand * * *" (*People ex rel. Att'y Gen. v. Johnson*, 34 Colo. 189, 193; 86 Pac. 233, 249), at the close of his opinion (page 193) it is observed: "Wherever the question has been presented, the courts have given effect to the wishes of the people and sustained the power to establish the form of government here provided as not being in violation of the federal Constitution, and not in excess of the powers of the people to so provide in their organic law. And it is to be regretted that this court felt in duty bound to undo the work of the charter convention and to deny the people of this city and county the right to provide for a simple and economical plan of government as directed by the Constitution." Our holding is that the state may, by constitutional provisions, directly delegate to municipalities any powers which it, through the Legislature, could formerly have granted indirectly. All the prerogatives attempted to be exercised by Portland in the construction of the Broadway bridge formerly could have been granted by the Legislature, and the power to provide therefor, having been delegated to the city by amendment to our organic laws, is valid, and the right to exercise such powers will continue until such time as changed by general enactments of the lawmaking department of our state, provision for which may be made by the Legislature by general laws, applying alike to all municipalities of that class, or by the people through the initiative, by the enactment of either general or special laws on the subject. *Cooley, Const. Lim.* (6th Ed.) 41, 45; *Hopkins v. Duluth*, 81 Minn. 189, 83 N. W. 536; *In re Pfahler*, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092; *Ex parte Wagner*, 21 Okl.

33, 95 Pac. 435; *State v. Field*, 99 Mo. 352, 12 S. W. 802; *Kansas v. Marsh*, 140 Mo. 458, 41 S. W. 943; *Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *State v. Pacific States Tel. & Tel. Co.*, 53 Or. 163, 99 Pac. 427; *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *City of McMinnville v. Hownestine*, 109 Pac. 81.

In a public address prepared by Hon. Frederick V. Holman, attached to and filed as an appendix to petitioner's brief, it is argued that our previous holding in *Hall v. Dunn*, 52 Or. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193, and *Straw v. Harris*, 54 Or. 424, 103 Pac. 777, to the effect that we have but one lawmaking department, composed of two separate and distinct lawmaking bodies—(1) The people acting directly through the initiative; and (2) 210 & 211 the people acting indirectly through the Legislature—either of which in a manner provided by law may undo the work of the other, and necessarily must lead to disastrous results, etc., in that an act passed by the first may immediately on the convening of the Legislature be repealed, and one enacted by the legislative assembly may also be re-cinded through either the initiative or the referendum. But that objection applies only to the question of expediency, with regard to which the lawmakers, and not the courts, are concerned. It might not be inappropriate, however, to observe that the same objection may with equal force apply to all legislative bodies. Our Legislature to convene next week can, if it so chooses, repeal all the laws (not included in constitutional amendments) enacted at the recent November election, and also undo the work of the last legislative assembly. Again, two years later or earlier a special session of the Legislature might be called, and enact many laws, and the day following its adjournment the newly elected Legislature could be convened and repeal all the laws going into effect the preceding day. The same may also be said of Congress, but this is seldom, if ever, urged as an argument against a representative system, or alluded to as indicating that our government is becoming unrepresentative in form. In the appendix mentioned, it is observed that under our system, as interpreted by this court, we have four legislative bodies in place of two: (1) The Legislature; (2) the people of the whole state; (3) the people of a municipality; (4) the common council or commissioners. This suggestion, however, overlooks the fact that in the above-cited cases advertence was made only to legal departments of the state, and not to municipal or other minor and quasi legislative bodies. The fallacy of this illustration (like many others to which our attention is directed, and which will not be specifically discussed) is obvious. The observation to the effect that under the interpretation given by this court to the charter amendments cities may invade the domain of state legislation to the extent, if desired, of condemning state property (such as capitol buildings, etc.), has no justification, either in the language of the charter amendments, or in anything said in any opinion of this court in interpreting such amendments. Many of the statements in our former opinions bearing upon points here presented are adverted to as dictum, and like contention is also made respecting our holding in the case at hand, to the effect that it is

unnecessary to obtain the consent of the Port of Portland before the bridge in question may be constructed. The points decided, determining the status of the Port of Portland in the matter, were all forcibly presented in the briefs and at the oral argument, and the effect of the conclusion reached by this court was that, taking either horn of the dilemma, appellant's position is untenable. It cannot, therefore, be said that our views upon either point are dicta, and the same may be remarked of much, if not all, of the numerous like references to previous adjudications by this court (as in *Straw v. Harris* and other cases) in which the views alluded to as dicta hold adversely to the wishes and contention of the writers of petitioner's brief and the appendix thereto. On what is dicta and the effect thereof see *Kirby v. Boyette*, 118 N. C. 244, 254, 24 S. E. 18; *Buchner v. C., M. & N. W. Ry. Co.*, 60 Wis. 264, 19 N. W. 56; *Kane v. McCown*, 55 Mo. 181; *Ocean Beach Ass'n v. Brinley*, 34 N. J. Eq. 438; 26 Am. & Eng. Ency. L., 165, 171; *Florida Cent. Ry. Co. v. Schutte*, 103 U. S. 118, 143, 26 L. Ed. 327. The terms "obiter dicta," "dictum," etc., like the phrase "technicalities of the law," are too often invoked by counsel to express disapprobation of some proposition of law militating against their contention.

Numerous other points are presented upon which the views of this court are requested. Some of them, however, were disposed of in our former opinions herein, to which we still adhere, and those remaining, even though not specifically adverted to, are included in the above considerations.

The petition for rehearing is denied.

* * * * *

212 In the Supreme Court of the State of Oregon.

FRANK KIERNAN, Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation; JOSEPH SIMON,
Mayor of City of Portland; A. L. Barbur, Auditor of City of Port-
land, and Joseph Buchtel, Respondents.

*Assignment of Errors on Writ of Error to the Supreme Court of the
United States.*

Now comes Frank Kiernan, appellant in the above entitled cause, and plaintiff in error to the Supreme Court of the United States, by his attorney, and files herewith his Petition for Writ of Error, and also his assignments of errors on Writ of Error to the Supreme Court of the United States, and avers and shows:

That in the records and proceedings of the above entitled cause the Supreme Court of the State of Oregon erred, to the grievous injury and wrong of the plaintiff in Error therein, and to the prejudice and against the rights of plaintiff in error, and for the purpose of having said proceedings in the above entitled cause reviewed in the Supreme Court of the United States, plaintiff in error presents the following assignment of errors, and prays for reversal of decision in

the above entitled cause in this Court by the Supreme Court of the United States:

First. The Supreme Court of the State of Oregon erred in affirming the decision of the Circuit Court of the State of Oregon for Multnomah County, denying the injunction and relief prayed for in the amended complaint, and dismissing the suit and in not granting the injunction and relief prayed for in the amended complaint:

Second. The Supreme Court of Oregon erred in holding and deciding that the alleged amendment to the Constitution of the State of Oregon, Section 2, Article XI, as attempted to be amended in 1906, and Section 1 of Article IV, of the Constitution of the State of Oregon as attempted to be amended in 1902, and Article IV of the Constitution of Oregon as attempted to be amended by inserting Section 1-a in 1906, and the attempted amendment to the Charter of the City of Portland, known as Section 118½, and the ordinance of the City of Portland #20208, entitled "An Ordinance providing for the issuance and sale of bonds of the City of Portland for the Construction of a high-bridge across the Willamette river from a point at or near Broadway and Larrabee streets on the East side of said river, and following the line of Broadway street extended westerly in its present course, to a point at or near its intersection with 7th street on the west side of said river, with its approaches, terminals and necessary accessories, approving the form of said bonds, and the coupons to be attached thereto, and declaring an emergency," which said pretended ordinance was attempted to be passed by the Council of the City of Portland, on October 27, 1909, and was submitted to the Mayor of the City of Portland on October 27, 1909, and said Mayor of the City of Portland, on October 27, 1909, attempted to approve the same, which Constitutional amendments to the Constitution of the State of Oregon pretended to delegate and reserve to the electors of municipalities, all the power that the State of Oregon has to all local, special, and municipal legislation of every character, in or for their respective municipalities and districts, and also attempted to prohibit the Legislative Assembly from enacting, amending or repealing any Charter or act of Incorporation for any municipality, city or town, and to grant to the legal voters of every city and town, power to enact and amend their municipal Charter, subject only to the Constitution and criminal laws of the State of Oregon, and which Section 118½ of the Charter of the City of Portland was attempted to be enacted by the Council of the City of Portland and the electors of the City of Portland, in pursuance to said Constitutional amendments and by said Section 118½ to the charter of the City of Portland, the electors of the municipality of the City of Portland attempted to exercise the sovereign power of the State of Oregon, by attempting to authorize the issuance of bonds and the levying of taxes to pay said bonds in large amounts, upon the property within the City of Portland, State of Oregon, and also to grant a franchise across the Willamette river, a navigable river, owned by the State of Oregon, and subject only to the joint control of the State of Oregon and the United States of America, and also sought to exercise the sovereign power of the State

of Oregon, over the County of Multnomah, by attempting to provide that the County of Multnomah shall operate, control and manage and keep in repair, said Broadway Bridge, as other bridges across the Willamette river within the State of Oregon are operated, controlled and managed, as required by law enacted by the sovereign State of Oregon, and also that said ordinance #20208, which pretended to carry out said constitutional amendments and said section 118 $\frac{1}{2}$ of the Charter of the City of Portland, were not contrary to and in violation of, the following provisions of the Constitution of the United States, and in deciding and holding that the State may, by constitutional provisions, directly delegate to municipalities any powers which it, through the Legislature, could formerly have granted indirectly, and that such was the effect of the Charter amendments under consideration, and that all the prerogatives attempted to be exercised by Portland in the construction of the Broadway Bridge, could formerly have been granted by the Legislature, and power to provide therefor having been delegated to the City, by amendment to our Organic Laws, is valid, and the right to exercise such powers will continue until such time as changed by general enactments of the law-making department of our State, provision for which, may be made by the Legislature by general laws, applying alike to all municipalities of that class, or by the people through the initiative, by enactment of either general or special laws on the subject. The said provisions of the Constitution of the United States relied on by petitioner, and not given force and effect by said Supreme Court of Oregon, are as follows, to-wit:

(a) Article IV, Section 3.

"New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislature of the states concerned, as well as of the congress.

The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

(b) Article IV, Section 4.

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

(c) Article VI.

"This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

(d) XIV Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Third. The Supreme Court of Oregon erred in holding and deciding "That the State may, by constitutional provisions, directly delegate to municipalities, any provisions which it, through the Legislature, could formerly have granted indirectly."

In *Howenstein v. City of McMinnville, Or.* 109. Pac. R. 81, we held such to be the effect of the Charter amendments under consideration. All the prerogatives attempted to be exercised by Portland in the construction of the Broadway Bridge could formerly have been granted by the Legislature, and the power to provide therefor having been delegated to the City, by amendment to our Organic Laws, is valid and the right to exercise such powers will continue until such time as changed by general enactments of the law-making department of our state, provision for which may be made by the Legislature by general laws, applying alike to all municipalities of that class, or by the people through the initiative, by the enactment of either general or special laws on the subject," and in deciding that such holding and decision is not contrary to and in violation of:

217 (a) Section 3 of Article IV, of the Constitution of the United States of America.

(b) In violation of Section 4 of Article IV of the Constitution of the United States of America;

(c) In violation of Article VI of the Constitution of the United States of America;

(d) In violation of Section 1 of the XIV amendment to the Constitution of the United States of America;

(e) In violation of the Act of Congress of February 14, 1869, admitting the State of Oregon into the Union, the preamble of which is here quoted: "Whereas, the people of Oregon have formed, ratified and adopted a Constitution of State Government, which is Republican in form, and in conformity with the Constitution of the United States, and have applied for admission into the Union on an equal footing with the other States;

Therefore, that Oregon be, and she is hereby, received into the Union on an equal footing with the other States in all respects whatever with the following by-laws."

(f) the implied provision of the Constitution of the United States of America, that the Government of the several states shall be representative in form, and that the several states shall create and maintain representative Legislative Assemblies.

Fourth. The Supreme Court erred in holding and deciding that it is beyond the power of the City to impose the care and maintenance of a public bridge upon Multnomah County, without the County authorities shall consent thereto, and that so far as this

clause of the amendment goes, beyond giving a mere permission to do so, it is void, but it does not follow that the whole amendment is void, merely because one clause, easily separable from the rest, is ineffective, as such attempted decision is an attempt on the part of the Supreme Court of Oregon to exercise legislative power and enact

218 amendments to the Charter of the City of Portland, and enact a law authorizing the issuance of bonds and the levying of taxes upon the property of the taxpayers of the City of Portland, including this petitioner, and the same is in violation of Section 1 of the XIV amendment to the Constitution of the United States of America, as it is an illegal attempt by the Supreme Court of Oregon to illegally exercise the power of the State of Oregon to deprive plaintiff and all other taxpayers of the City of Portland, of their property, without due process of law, and to deny to the petitioners the equal protection of the law.

Fifth. The Supreme Court of Oregon erred in holding and deciding that valid permission had been obtained from the War Department, and that even if this were not so, the plaintiff does not stand in such a relation to the subject-matter as to be able to raise the question which is one to be settled between the Government authorities and the City, because plaintiff pleaded and contended that the City of Portland could not issue the bonds mentioned in the amended complaint, and tax plaintiff to pay said bonds, and for this bridge across the Willamette river, a navigable stream, until the Government of the United States of America authorizes, empowers or consents, to the building of said proposed bridge across the Willamette river by the defendants, and plaintiff proved without dispute that no such authority or consent had been given by the United States of America, and by reason thereof plaintiff was entitled to the right and immunity of freedom from this attempted tax exaction of defendants under the statutes of the United States of America, and also that the said authority attempted to be exercised by defendants under said claim of power from the State of Oregon was repugnant to the laws of the United States of America, and said decision is against said right and immunity especially set up and claimed by plaintiff under the laws of the United States of America

219 and such holding and deciding illegally deprives plaintiff of his property without due process of law and denies to plaintiff the equal protection of the laws, in violation of Section 1 of the XIV amendment to the Constitution of the United States of America.

Sixth. The Supreme Court of Oregon erred in holding and deciding that the granting of a franchise and building a bridge across the Willamette river, owned by the State of Oregon and controlled jointly by the United States of America and the State of Oregon, is a municipal purpose instead of a State purpose and can be granted by the electors of the City of Portland in amending their Charter, and in refusing to follow and apply the settled law of the United States of America to this case, which is that the building of a bridge and granting a franchise for a bridge across the Willamette river, a navigable stream, owned by the State of Oregon, is a State pur-

pose and not a municipal purpose, and requires the joint and concurrent action of the United States of America and the State of Oregon in order that such right and franchise to build a bridge across the Willamette river can be obtained, because plaintiff pleaded and contended that the City of Portland could not issue the bonds mentioned in the amended complaint and tax plaintiff to pay said bonds, and for this bridge across the Willamette river, a navigable stream, until the Government of the United States of America and the State of Oregon both authorize, empower or consent to the building of said proposed bridge across the Willamette river by the defendants, and plaintiff proved without dispute that no such authority or consent had been given by the United States of America or the State of Oregon, and by reason thereof plaintiff was entitled to the right and immunity of freedom from this attempted tax exaction of defendants under the statutes of the United States of America, and also that the said authority attempted to be exercised by defendants under said claim of power from the State of Oregon was repugnant to the

laws of the United States of America and said decision is
220 against said right and immunity specially set up and claimed by plaintiff under the laws of the United States of America, and such holding and deciding illegally deprives plaintiff of his property without due process of law, and denies to plaintiff the equal protection of the laws in violation of Section 1 of the XIV amendment of the Constitution of the United States of America.

221 Seventh. The Supreme Court erred in holding and deciding that the Council of the defendant City and the electors of the defendant City could enact a charter amendment to the Charter of the City of Portland, by which they could issue bonds in a large amount and tax the property of plaintiff for the payment of the bonds as the authorizing of a tax in the Charter of a municipality is not a municipal purpose, but a state purpose, and must come from the sovereign State of Oregon and it has not been granted by the Legislature of the State of Oregon or by the sovereign people of the State of Oregon to the Council and electors of the City of Portland, and it is not within the constitutional power of the people of the State of Oregon to delegate the power to tax without limitation, to the electors of a municipality, and the attempt to do so and the decision attempting to up-hold said power is in violation of Section 1 of the XIV amendment to the constitution of the United States of America, and void. And also in violation of Section 3 of Article IV of the Constitution of the United States of America, and such a grant of power by the State of Oregon is to commit State suicide, and dissolve the State of Oregon into as many smaller states as there are municipalities within the state and to change the republican Government of the State of Oregon into a Confederacy of Cities within the State of Oregon, and tends to destroy our system of Government created and guaranteed by the Constitution of the United States of America.

Eighth. The Supreme Court of Oregon erred in holding and deciding that plaintiff, a citizen of the United States, must conform his conduct and hold his property in state matters and tax matters, to a rule of conduct or law enacted by mere numbers of people and assem-

222 blages of people within the borders of a municipality, because it is not in accordance with due process of law and is in violation of the law of the land, to require any citizen of the United States to conform his conduct, and hold his property in state matters and in tax matters, to a rule of conduct or law, enacted directly by mere numbers of people or assemblages of people within a municipal corporation, and is contrary to Section 1 of the XIV amendment to the Constitution of the United States of America; sections 3 and 4 of Article IV of the Constitution of the United States of America, and also is contrary to the implied provisions of the Constitution of the United States that government of the several states shall be representative in form and that the several states shall create and maintain representative Legislative Assemblies, and that the citizens of the United States shall be protected in their right of enjoyment of life, liberty, and property by the law of the land, and is an inherent attribute of citizenship of the United States, which no state or its people may impair.

And by reason of the foregoing errors and holdings, the appellant and plaintiff in error, prays that the said judgment and decree may be reversed, and that a mandate be issued, decreeing that a decree be entered in favor of the appellant and plaintiff in error, and for the costs and disbursements, and that he may be restored to all things which he has lost by reason of said judgment and decree.

RALPH R. DUNIWAY,

Attorney for Appellant and Plaintiff in Error.

223 [Endorsed:] No. —. In the Supreme Court, State of Oregon. Frank Kiernan, Plaintiff, vs. City of Portland et al., Defendant. Assignments of Error on Writ of Error to U. S. Supreme Court. Filed Jan. 10, 1911. J. E. Moreland, Clerk. By — — —, Deputy. — — —, Attorney for — — —

224 In the Supreme Court of the State of Oregon.

FRANK KIERNAN, Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation; JOSEPH SIMON, Mayor of City of Portland; A. L. Barbur, Auditor of City of Portland, and Joseph Buchtel, Respondents.

Petition for Writ of Error.

Comes now, the above Frank Kiernan, appellant, and shows:

That heretofore and on the first day of November, 1910, a judgment and decree was entered by the above named Supreme Court of the State of Oregon against your petitioners, affirming the judgment and decree of the Circuit Court of the State of Oregon for Multnomah County, in favor of the above named respondents and defendants, and against the above named appellant, and that on December 31, 1910, an opinion was rendered by the above named Supreme Court

of Oregon in said cause, denying appellant's petition for re-hearing and affirming said judgment of affirmance of the judgment and decree of said Circuit Court of the State of Oregon for Multnomah County, in favor of the above respondents and defendants, and against the above named appellant, as will appear by the record and proceedings in said cause in which decree and decision and proceedings had prior thereto in this case, certain errors were committed to the prejudice of the plaintiff and appellant, by the Supreme Court's sustaining the validity of authority exercised under the State of Oregon, when said authority was questioned by appellant on the ground of *there* being repugnant to the Constitution and Laws of the United States of America, all of which will appear in more detail from the assignment of errors, which is filed with this petition.

Wherefore, this petitioners and appellant prays that a writ of error, issue in this behalf, returnable in the Supreme Court of the United States for correction of the errors complained of, and that a duly authenticated transcript of the record and proceedings in this case may be sent to the Supreme Court of the United States.

RALPH R. DUNIWAY,

Attorney for Petitioners.

STATE OF OREGON,

County of Multnomah, ss:

I, Frank Kiernan, being first duly sworn, depose and say: That I am the foregoing petitioner: That the foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to these matters, I believe the same to be true.

FRANK KIERNAN.

Sworn to before me, this 10th day of January, A. D., 1911.

[Seal of Ralph R. Duniway, Notary Public, State of Oregon.]

RALPH R. DUNIWAY,

Notary Public for Oregon.

226 STATE OF OREGON,

Supreme Court, ss:

Let the Writ of Error issue upon the execution of a bond by Frank Kiernan, to the City of Portland, a municipal corporation, Joseph Simon, Mayor of City of Portland, A. L. Barbur, Auditor of City of Portland, and Joseph Buchtel, respondents, in the sum of One thousand (\$1000.00) Dollars, and said bond when approved, to act as a supersedeas.

Dated, January —, 1911.

ROBERT EAKIN,

Chief Justice of the Supreme Court of the State of Oregon.

227 [Endorsed:] No. —. In the Supreme Court, State of Oregon. Frank Kiernan Appellant vs. City of Portland et al. Respondents. Petition for writ of error. Filed Jan. 10, 1911. J. C. Moreland, Clerk. By ———, Deputy. Ralph R. Duniway, Attorney for Petitioner.

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In the Supreme Court of the United States.

FRANK KIERNAN, Plaintiff in Error,

vs.

THE CITY OF PORTLAND, a Municipal Corporation; JOSEPH SIMON,
Mayor of the City of Portland; A. L. Barbur, Auditor of the City
of Portland, and Joseph Buchtel, Respondents in Error.

Bond on Writ of Error.

Know all men by these presents, that Frank Kiernan as principal, and Thomas Scott Brooke as surety, are held and firmly bound unto the above named City of Portland, a municipal corporation, Joseph Simon, Mayor of City of Portland, A. L. Barbur, Auditor of City of Portland, and Joseph Buchtel, defendants in error, in the sum of One thousand (\$1000.00) Dollars, to be paid to them or either of them, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our, heirs, executors, administrators, representatives, successors and assigns, firmly by these presents.

Sealed with our seals this 9 day of January, 1911.

Whereas, the above named plaintiff in error seeks to prosecute his Writ of Error to the Supreme Court of the United States to reverse the judgment and decree rendered in the above entitled suit, by the said Supreme Court of the State of Oregon.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute such Writ of Error to effect and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation shall be void, otherwise to be and remain in full force and effect.

FRANK KIERNAN.

THOMAS SCOTT BROOKE.

229 UNITED STATES OF AMERICA,
District of Oregon, ss:

I, Thomas Scott Brooke the surety whose name is subscribed to the above bond, being first duly sworn, *each for himself* says: That I am a resident and freeholder within the State of Oregon, and am not a counselor or Attorney at Law, Sheriff Clerk or other Officer of any Court, and am worth the sum of Two Thousand (\$2000.00) Dollars, over all debts and liabilities, and exclusive of property exempt from execution.

THOMAS SCOTT BROOKE.

Subscribed and sworn to before me this 9th day of January, A. D.
1911.

[SEAL.]

RALPH R. DUNIWAY,
Notary Public for Oregon.

STATE OF OREGON,
County of Marion, ss:

The within undertaking is hereby approved.
Jan'y 10, 1911.

ROBERT EAKIN,
Chief Justice.

(Endorsed:) In the Supreme Court of the United States. Frank Kiernan plaintiff in Error vs. City of Portland, et al., Defendants in Error. Bond on Writ of Error. Filed Jan. 10, 1911, J. C. Moreland, Clerk. By ———, Deputy. Ralph R. Duniway Attorney for plaintiff in error.

230 In the Supreme Court of the United States.

FRANK KIERNAN, Plaintiff in Error,
vs.

THE CITY OF PORTLAND, a Municipal Corporation; JOSEPH SIMON Mayor of City of Portland; A. L. Barbur, Auditor of City of Portland, and Joseph Buchtel, Respondents in Error.

Writ of Error.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendering of the decree in the Supreme Court of the State of Oregon, before you or some of you, being the highest Court of Law or Equity of the said State, in which a decision could be had in the said suit between Frank Kiernan, plaintiff and plaintiff in error, and the City of Portland, a municipal corporation, Joseph Simon, Mayor of City of Portland, A. L. Barbur, Auditor of City of Portland, and Joseph Buchtel, defendants and defendants in error, wherein was drawn into question the validity of two amendments to the Constitution of the State of Oregon, also the validity of an amendment to the charter of the City of Portland, Section 118½ thereof, also of a certain Ordinance passed by the said City of Portland, a municipal corporation which are all authorities exercised under said State, on the ground of their being repugnant to the Constitution or laws of the United States of America, and the decision was in favor of their validity and was against the title, right, privilege or exemption, specially set up or claimed under such clause of the Constitution or Statute of the United States, and the title or privilege or exemption specially set up or claimed under such section of the Constitution or statutes, a manifest error hath happened to the great damage of the said Frank Kiernan, as by his complaint appears:

We being willing that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given

that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you may have the same at Washington, on the — day of February, next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, The Honorable Edward Douglas White, Chief Justice of the United States, this 10th day of January, A. D. 1911.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH,
*Clerk of the Circuit Court of the United
States for the District of Oregon.*

Allowed:

ROBERT EAKIN,
*Chief Justice of the Supreme Court for
the State of Oregon.*

232 [Endorsed:] No. —. In the Supreme Court of the United State. Frank Kiernan Plaintiff in Error vs. City of Portland et al. Defendants in error. Writ of error. Filed Jan. 11, 1911. J. C. Moreland, Clerk. By — — — Deputy. — — —, Attorney for — — —.

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Citation.

In the Supreme Court of the United States.

FRANK KIERNAN, Plaintiff in Error,
vs.

THE CITY OF PORTLAND, a Municipal Corporation; JOSEPH SIMON, Mayor of City of Portland; A. L. Barbur, Auditor of City of Portland, and Joseph Buchtel, Respondents in Error.

UNITED STATES OF AMERICA, ss:

To the City of Portland, a Municipal Corporation; Joseph Simon, Mayor of City of Portland; A. L. Barbur, Auditor of City of Portland, and Joseph Buchtel, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Oregon, wherein Frank Kiernan is plaintiff in error, and you are defendants in error, to shew cause, if any, there be, why the decree rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert Eakin, Chief Justice of the Supreme Court of the State of Oregon, this 10th day of January, in the year of Our Lord, One thousand nine hundred and eleven.

ROBERT EAKIN,
Chief Justice of the Supreme Court of Oregon.

234 & 235 STATE OF OREGON,
County of Multnomah, ss:

Due service of the within citation is hereby accepted in Multnomah County, Oregon this 11 day of January 1911, by receiving a copy thereof, duly certified to as such by Ralph R. Duniway attorney for plaintiff in error and enter- an appearance in the Supreme Court of the United States.

FRANK S. GRANT,
Attorney for Defendants.

FRANK S. GRANT,
Attorney for Defendants in Error.

[Endorsed:] No. —. In the Supreme Court of the United States. Frank Kiernan plaintiff in error vs. City of Portland et al. defendants in error. Citation. Filed January 23 1911. J. C. Moreland clerk by Arthur S. Benson deputy. Ralph R. Duniway attorney for plaintiff in error.

* * * * *

236 UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court of Oregon, in the city of Salem, this 28th day of January 1911.

[Seal Supreme Court, State of Oregon. 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

Cost of transcript \$105 paid by Frank Kiernan, Plaintiff in Error.

J. C. MORELAND,
Clerk Supreme Court of Oregon.

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In the Supreme Court of the State of Oregon.

FRANK KIERNAN, Appellant,
vs.

THE CITY OF PORTLAND, a Municipal Corporation; JOSEPH SIMON,
Mayor of the City of Portland; A. L. Barbur, Auditor of the City
of Portland, and Joseph Buchtel, Respondents.

Whereas, a writ of error has been obtained from the Supreme Court of the United States by the above named Frank Kiernan, plaintiff in error, against the City of Portland, a municipal corporation, Joseph Simon, Mayor of the City of Portland; A. L. Barbur, Auditor of the City of Portland, and Joseph Buchtel, respondents in error, directing the Supreme Court of Oregon to certify the record in the above entitled case to the United States Supreme Court; and

Whereas, the Clerk of the Supreme Court of Oregon, in preparing the transcript on appeal in said case, finds it will be necessary to either secure copies, or use the original exhibits, filed in the case, and that it will be more convenient to use the original exhibits in said case;

Now, therefore, it is stipulated and agreed, by and between the parties to said case, that the Clerk of the Supreme Court of Oregon may obtain an order from the Supreme Court of Oregon, permitting the original exhibits, filed in the case in the Supreme Court of Oregon, to be attached to, and sent with the, transcript to the Supreme Court of the United States, instead of obtaining and certifying further copies of said exhibits.

Jan. 20, 1911.

RALPH R. DUNIWAY,

Attorney for Frank Kiernan, Appellant in the Supreme Court of Oregon and Plaintiff in Error in the Supreme Court of the United States.

FRANK S. GRANT,

Attorney for the City of Portland, a Municipal Corporation; Joseph Simon, Mayor of the City of Portland; A. L. Barbur, Auditor of the City of Portland, and Joseph Buchtel, Respondents in the Supreme Court of Oregon and Respondents in Error in the Supreme Court of the United States.

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239 [Endorsed:] No. —. In the Supreme Court, State of Oregon. Frank Kiernan, appellant, vs. City of Portland et al., respondents. Stipulation to send up original Exhibits. Filed January 21, 1911. J. C. Moreland, clerk, by Arthur S. Benson, deputy. Ralph R. Duniway, 530 Chamber of Commerce, Portland, Oregon, attorney for — — —.

240 In the Supreme Court of the United States.

FRANK KIERNAN, Plaintiff in Error,
vs.
THE CITY OF PORTLAND et al., Defendants in Error.

Statement of the Errors Relied on by Plaintiff in Error and Statement of the Part of the Record Which Plaintiff in Error Thinks Necessary to be Printed for the Consideration of the Court.

The Plaintiff in error hereby states, that, in pursuance of rule 10, of the United States Supreme Court, he expects to rely on each and all of the assignments of error which are attached to the record filed in this case; and that, in his judgment, the following parts of the record, are necessary to be printed for the consideration of the court, to-wit:

The citation and acceptance of service, pages 233-234 of the record.

Writ of Error, page- 230-231 of the record.

Clerk's return on Writ of Error, page 236 of record.

Amended Complaint, pages 9 to 52 of record.

Answer, pages 53 to 63 of the record.

Motion of Plaintiff for decree upon the pleadings, pages 75 to 79 of the record.

Order of Court, denying motion for decree on pleadings, page 84 (86) of the record.

Opening statement of Circuit Court and stipulation of the parties, page 124 of the record.

Testimony of A. L. Barbur, Auditor of the City of Portland, found on pages 132-133 of the record.

241 Typewritten part of plaintiff's Exhibit "F." This is part of original document sent up by the Supreme Court, and is attached to page 237 of the record.

Testimony of J. P. Doyle, page 134 of the record.

Plaintiff's Exhibit "G" rejected, page 95 of the record.

Plaintiff's Exhibit "H" rejected, page 96 of the record.

Plaintiff's Exhibit "E" ordinance (#20208) page- 97 to 102 of the record.

Judgment of the Supreme Court, pages 157-158 of the record.

Opinion of the Supreme Court by Justice McBride, page- 150 to 156 of the record.

Opinion of the Supreme Court on re-hearing, by Justice King, page- 204 to 210 of the record.

Assignments of Errors, pages 212 to 222 of the record.

Petition for Writ of Error, pages 224 to 226 of the record.

Bond on Writ of Error, pages 228-229 of the record.

Respectfully submitted,

RALPH R. DUNIWAY,
Attorney for Plaintiff in Error.

T. J. GEISLER,
Of Counsel for Plaintiff in Error.

242 STATE OF OREGON,
County of Multnomah, ss:

Due service of the within statement is hereby accepted in Multnomah County, Oregon this 1st day of May 1911, by receiving a copy thereof, duly certified to as such by T. J. Geisler of counsel for Plaintiff in Error.

FRANK S. GRANT,
By H. M. TOMLINSON,
Of Attorneys for Defendants in Error.

[Endorsed:] 896/22,517. No. —. In the Supreme Court of the United States. Frank Kiernan, Plaintiff, vs. City of Portland et al., Defendant. Office of the Clerk, Supreme Court U. S. Received

May 6, 1911. Ralph R. Duniway, Attorney for Plaintiff.
243 [Endorsed:] File No. 22,517. Supreme Court U. S. October Term, 1910. Term No. 896. Frank Kiernan, Pl'ff in Error, vs. The City of Portland et al. Specification by plaintiff in error of errors to be relied on and designation of parts of record to be printed, with proof of service of same. Filed May 6, 1911.

244 PL'FF'S EX. F. C. H. S., Off. Stenog.

J. A. G. O.

(26391.)

Whereas, By Section 9 of an act of Congress, approved March 3, 1899, entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," it is provided that bridges, dams, dikes, or causeways may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced:

And whereas, the City of Portland, Oregon, having authority of the legislature of the State of Oregon to construct a bridge across the Willamette River, at Broadway, in the City of Portland, in said State, has submitted a map of the location and plans of the same, which have been approved by the Chief of Engineers:

Now, therefore, this is to certify that the map of location and plans of said bridge, which are hereto attached, are hereby approved by the Secretary of War, subject to the following conditions:

1. That the engineer officer of the United States Army, in charge of the district within which the bridge is to be built, may supervise its construction, in order that said plans shall be complied with.
2. That the plan of operation to be followed in constructing the bridge shall be submitted to and approved by said local engineer

officer, who shall be duly notified before actual construction of the bridge is commenced.

3. That this approval is given upon the distinct understanding that the War Department reserves the right to so regulate the work of construction and to so prescribe the order in which the various parts shall be executed as to secure the least practicable interference with, or inconvenience to, navigation due to the simultaneous prosecution of work on this bridge and on the proposed new "steel" bridge already authorized.

Witness my hand this 23d day of March, 1910.

ROBERT SHAW OLIVER,
Ass't Secretary of War.

Form No. 3.

W. D., J. A. G. O.

STATE OF OREGON,
County of Multnomah,
City of Portland, ss:

I, A. L. Barbur, Auditor of the City of Portland, do hereby certify that I have compared the foregoing copy of certificate of Assistant Secretary of War approving map of location and plans of Broadway Bridge with the original thereof, and that the same is a full, true and correct transcript of such original certificate and of the whole thereof as the same appears on file and of record in my office, and in my care and custody.

In witness whereof, I have hereunto set my hand and seal of the City of Portland affixed this 15th day of June, 1910.

A. L. BARBUR,
Auditor of the City of Portland,
By C. F. WIEGAND, *Deputy.*

(Signed)

Endorsed on cover: File No. 22,517. Oregon Supreme Court. Term No. 503. Frank Kiernan, plaintiff in error, vs. The City of Portland, Joseph Simon, mayor, et al. Filed February 11th, 1911. File No. 22,517.

OCT 16 1911

JAMES H. McKENNEY,

Clerk

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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM 1910

NO. 896

FRANK KIERNAN,
Plaintiff in error.

vs.

THE CITY OF PORTLAND, a Municipal
Corporation, JOSEPH SIMON, Mayor of
City of Portland, A. L. BARBUR, Auditor
of City of Portland, and JOSEPH
BUCHTEL,
Defendants in error.

No. 503

Motion to Advance Hearing

RALPH R. DUNIWAY,

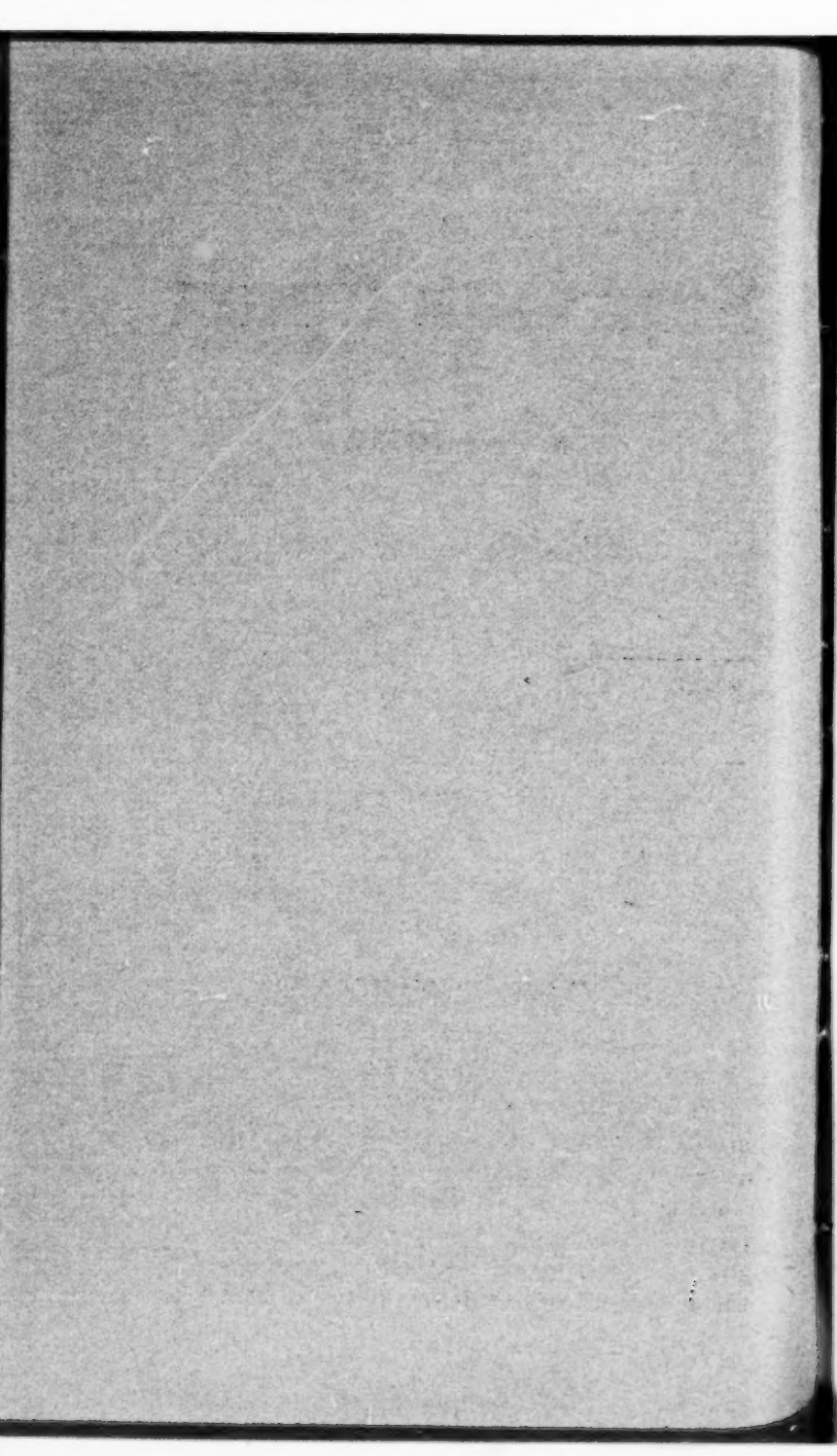
T. J. GEISLER,

Attorneys for Plaintiff in Error.

FRANK S. GRANT,

WM. C. BENBOW,

Attorneys for Defendants in Error.



IN THE

Supreme Court

OF THE

United States

OCTOBER TERM 1910

NO. 896

FRANK KIERNAN,
Plaintiff in error.

vs.

THE CITY OF PORTLAND, a Municipal
Corporation, JOSEPH SIMON, Mayor of
City of Portland, A. L. BARBUR, Auditor
of City of Portland, and JOSEPH
BUCHTEL,
Defendants in error.

Motion to Advance Hearing

Now comes the defendants in error and moves the court that the above entitled suit be advanced to a hearing at the same time as the hearing of the suit of the Pacific States Telephone and Telegraph Company vs. State of Oregon now pending in this court. The reasons for the advancement of this suit to the time of hear-

ing of the Pacific States Telephone and Telegraph Company vs. State of Oregon are:

1. That both this suit and said last mentioned suit involve the consideration of the question as to whether or not the initiative and referendum amendments to the Oregon Constitution, approved June 2, 1903, violate any of the provisions of the Constitution of the United States or any Federal statute. And such question can be submitted and determined at the same hearing.

2. That the determination of this question is of supreme public importance to the City of Portland which is issuing bonds upon the basis of the validity of such constitutional amendment.

3. It is also of great public importance to said city to have determined the further constitutional amendment to the Constitution of the State of Oregon approved June 4, 1906, reserving to the legal voters of the municipality the initiative and referendum powers "as to all local, special and municipal legislation." Oregon Constitution, Article 4, Section 1a and Article 11, Section 2.

Wherefore, the defendants in error, with the consent of the plaintiff in error, hereby moves the court that the above entitled suit be set down for argument and heard and determined at the same time as the hearing of the Pacific States Telephone and Telegraph Company vs. State of

Oregon suit, and for such further order as to the court may seem just in the premises.

FRANK S. GRANT,

WM. C. BENBOW

Attorneys for Defendants in Error.

In the Supreme Court of the United States.

Frank Kiernan, plaintiff in)	} STIPULATION } TO ADVANCE } HEARING.
error,)	
vs.)	
The City of Portland et al.,)	
defendants in error.)	

It is hereby stipulated and agreed by and between the plaintiff in error and the defendants in error by and through their respective attorneys, Ralph R. Duniway and T. J. Geisler, and Frank S. Grant and Wm. C. Benbow, that the matter set forth in the motion to advance this suit are true and correct and that the above entitled suit be set down for argument and determination together with and at the same time as the hearing of the suit of the Pacific States Telephone and Telegraph Company vs. State of Oregon and both the plaintiff in error and defendants in error waive any irregularity in the proceedings whereby such hearing shall be had at the time above mentioned.

RALPH R. DUNIWAY,

T. J. GEISLER,

Attorneys for Plaintiff in Error.

FRANK S. GRANT,

WM. C. BENBOW,

Attorneys for Defendants in Error.

FRANK KIERNAN,	} Affidavits on Motion to Ad- vance Hear- ing.
Plaintiff in Error,	
vs.	
THE CITY OF PORTLAND,	
et al.,	
Defendants in Error.	

State of Oregon, County of Multnomah, ss.

I, Frank S. Grant, being first duly sworn, say I am city attorney of the defendant City of Portland and have been such attorney and for more than one year last past have acted for said city in the suits known as the "Broadway Bridge Litigation." That I am familiar with said suits and the facts and law involved therein.

PRESENT SUIT.

On June 2, 1903, there was adopted in the State of Oregon a system of legislation known as initiative and referendum. Such adoption was by amendment to the Constitution reserving to the people of the state the right to initiate legislation and to refer laws passed by the legislature to the people for ratification or rejection. This amendment reserved the initiative and referendum powers to the people of the entire state.

On June 4, 1906, the initiative and referendum powers which were reserved by the amendment of June 2, 1903, to the people of the State of Oregon were further reserved to

the people of the municipalities of said state "as to all local, special and municipal legislation." This reservation to the people of municipalities was adopted by an amendment to the Constitution of the State of Oregon known as Article IV, Section 1a. There was also adopted on said date of June 4, 1906, an amendment to the Constitution of the State of Oregon, known as Article XI, Section 2, which last amendment prohibited the legislative assembly from amending or repealing any charter of any municipality of the state and the power to amend municipal charters, subject to the Constitution and criminal laws of the State of Oregon, was reserved to the people of the municipality.

A method was thereafter provided by the laws of 1907 of the State of Oregon, Chapter 226, and by what was known as the "McNary Ordinance" of the City of Portland, to carry into effect said initiative and referendum powers reserved to the municipality of Portland.

Thereafter and on June 7, 1909, at a regular city election the legal voters of the City of Portland passed an amendment to their charter, known as Section 118½, authorizing and providing for the building of a bridge, hereinafter designated as the Broadway bridge, across the Willamette River within the City of Portland, and authorizing and providing for the issuing of two million dollars of bonds of

said city for the purpose of paying for the construction thereof. Thereafter and about the 27th day of October, 1909, the Council of the City of Portland passed an ordinance authorizing the issue and sale of two hundred fifty thousand dollars of said bonds in accordance with said amendment. Whereupon the plaintiff in error commenced the present suit in the Circuit Court of the State of Oregon for the County of Multnomah, seeking as a taxpayer to enjoin the issue and sale of said bonds upon the ground, among others, that the amendment to the charter of the City of Portland was void because the initiative and referendum amendments to the Constitution of the State of Oregon were void; which last amendments were claimed to be void because they conflicted with Section 4 of Article IV of the Constitution of the United States.

The Circuit Court of the County of Multnomah, State of Oregon, after a trial refused to grant an injunction prohibiting the sale of the bonds, and plaintiff in error appealed to the Supreme Court of the State of Oregon, and on October 31, 1910, the action of the lower court was affirmed. A motion for rehearing was then filed by the plaintiff in error, which motion was denied in a learned opinion by Judge King.

Thereafter the plaintiff in error sued out a writ to this court claiming that a federal question was involved.

OTHER SUITS.

Several other suits were commenced by Kiernan against the city, involving substantially the same issues as were raised in the first suit, as follows:

On October 21, 1910, plaintiff in error and his attorney, R. R. Duniway, who appeared for him in the first suit, commenced a **second suit**, hereafter designated as the "second suit," and filed a complaint therein making the City of Portland a party, together with its mayor and auditor, and also making the bank of Ladd & Tilton a party, which said second suit involved substantially the same issues as were raised in the first suit, being different only in the fact that it made Ladd & Tilton a party and set forth the sale of a certain two hundred fifty thousand dollars worth of bonds to said Ladd & Tilton, the issue of which Kiernan had attempted to enjoin in the first suit.

An application was made to Judge Morrow, a circuit judge of said Multnomah County, for an injunction in said second suit, and upon argument of such application the same was denied. Whereupon a demurrer was interposed by defendants to said complaint, which was on the 31st day of January, 1911, sustained by Judge McGinn, another judge of the Circuit Court of Multnomah County. An application was then made and filed for a supplemental complaint in said second suit, which

after hearing was also denied by Judge McGinn. Afterwards an appeal was taken to the Supreme Court of the State of Oregon, which said appeal is now pending in that court.

On October 22, 1910, a **third suit**, by the Port of Portland against the City of Portland, was commenced, involving substantially the same questions involved in the first and second suits, but more especially directed to the authority of the City of Portland to build a bridge without the consent of said Port of Portland. While the plaintiff in error does not appear as a party in this third suit, and while the attorney for the Port of Portland is not said R. R. Duniway, plaintiff in error's attorney, nevertheless the same issues were substantially set forth in said third suit. And all of which said issues were fully determined by the Supreme Court of Oregon in this suit.

On or about November 7, 1910, plaintiff in error commenced a suit in the Circuit Court of the United States for the District of Oregon against the same defendants as hereinabove designated and the Ladd & Tilton Bank, which said suit is herein designated as the "**fourth suit.**" That this suit set out substantially the same questions that were raised in the first and second suits, but were more directed to the question involving the constitutionality of the amendments to the Constitution of Oregon known as the initiative and referendum amend-

ments. Thereafter a demurrer was interposed by defendants in error to said complaint, which demurrer was sustained by Judge Bean of said United States Circuit Court and the suit of plaintiff dismissed. No other proceedings have been had in said fourth suit.

On the 17th day of February, 1910, said R. R. Duniway, purporting to act for one W. F. Burrell, commenced a **fifth suit** against defendants in error and certain other parties, attacking the authority of the city to build said bridge and to enter into a contract for that purpose. A demurrer was interposed to said fifth suit by defendants in error, which was sustained by the Circuit Court of Multnomah County, and an appeal was taken by W. F. Burrell to the Supreme Court of the State of Oregon, where said suit is now pending.

That thereafter and on or about the 25th day of April, 1911, the City of Portland, defendant in error, commenced a suit and obtained an injunction against plaintiff in error enjoining him from commencing other or further suits which he threatened to do, involving the same questions alleged in the then pending suits. An injunction was granted to defendants in error on the ground that the commencing of any or further suits was vexatious litigation and not prosecuted in good faith, which injunction was on September 28, 1911, made permanent.

LETTERS AND TELEGRAMS.

Plaintiff in error in addition to commencing the suits above set forth, by and through his attorney, R. R. Duniway, wrote numerous letters and telegrams to financial concerns in the East who were contemplating the purchase of said bonds, making false statements in regard to the litigation that plaintiff in error was prosecuting and in regard to the credit of the city, which letters and telegrams, so far as the deponent has been able to obtain, are as follows:

"Boston, Oct. 6, 1910.

Shawmut Bank:

No bridge ever built across Willamette without franchise from state, which Portland has not got for Broadway bridge. Port of Portland has granted no franchise. No bonds ever sold under this alleged charter section.

(Signed) RALPH R. DUNIWAY,
Attorney for Frank Kiernan, Portland."

"Boston, Oct. 6, 1910.

Caston, Snow & Saltonstall, Attorneys,
Shawmut Bank Bldg., Boston:

Ladd and Tilton Bank decline to give me advance information whether you will or will not try to accept \$250,000 Broadway bridge bonds. Say they will follow your instructions promptly. Frank Kiernan is appealing his case. City has no franchise for bridge across river, and Port

of Portland will not allow bridge to be built. Will file new suit to enjoin your acceptance of bonds. If I get information in time otherwise I will file new suit to cancel bonds in your hands and tie you up. I think you will serve your own interest by giving me advance information so as not to tie up your money. If you refuse to accept bonds will furnish you defense to any action by city on bid free of expense.

RALPH R. DUNIWAY,
Attorney for Frank Kiernan, Portland,
Oregon."

"1 ex he 217 6 ex Count brackets,

Ex Chicago, Ill., Oct. 8-10.

National Shawmut Bank, Boston, Mass.:

Paper publishes your telegram asking further information. You have not been given full and correct information by city. You should be furnished all pleadings, evidence, authorities and two opinions delivered by Circuit Court. Charter amendment was not before court in form contained in pamphlet sent you when Council adopted resolution of March 31 and resolutions understood to identify act by title, and there is no good title to such. Document 21, Encyclopedia Law (second edition) 975, not filed with auditor sixty days before June 7; not published with legal ballot title; numbers were published wrong. Legal notice not given of election, minority vote. No other bonds have been heretofore issued under alleged charter amendment. Port of Portland must first grant franchise

across river before bridge can be built and bonds sold for that purpose (Montgomery vs. Portland, 190 U. S. 89). I am of the opinion that Port of Portland will not grant franchise for this bridge across river to obstruct harbor. Wish you to have full information, and feel sure that if you have you will refuse to take bonds. Small number petty politicians trying to build this bridge with other people's money in violation law. Obtained injunction Supreme Court Kiernan case.

(Signed) RALPH R. DUNIWAY,
Attorney for Frank Kiernan, Portland,
Oregon.
505p"

"528 Ch r4 110 NL 4 ex

Portland Ogn Oct. 9-10.

National Shawmut Bank, Boston:

Read what city officials published in today's Oregonian: 'If the Supreme Court in the original proceedings decides in Kiernans' favor the bonds would simply become invalid, and the purchasers and not city or Mr. Kiernan as a taxpayer would be the losers.' Also: 'After Mr. Benbow received a copy of the injunction yesterday he said he believed the Supreme Court had granted the injunction upon the theory that if the bonds are permitted to change hands at present they would get into the hands of an innocent purchaser who would suffer in case the bonds are finally found to be invalid.' Paper sent by mail.

(Signed) RALPH R. DUNIWAY,
Attorney for Frank Kiernan.
11.20p."

"Boston, Oct. 21, 1910.

Tell. Shawmut Nat. Bank:

Supreme Court of Oregon hearing argument of Kiernan case merits refused to continue temporary injunction because court holds your bid for bonds is subject to the decision of Supreme Court in Kiernan case, and purchaser buys at his peril, is not innocent purchase, and that lis pendens applies to these bonds, and that Kiernan does not need injunction. Started new suit against city and Ladd and Tilton Bank today.

RALPH R. DUNIWAY,
Atty. for Frank Kiernan."

"Ralph R. Duniway.

Portland, Ore., Jan. 12, 1911.

R. L. Day & Co., 35 Congress St., Boston, Mass.:

Gentlemen—The City of Portland is advertising for bids on \$500,000 Broadway bridge bonds to be opened January 24, 1911. You may be interested in knowing that Mr. Frank Kiernan, a taxpayer of the City of Portland, is contesting the legality of said bonds, and on January 10, 1911, obtained a writ of error from the United States Supreme Court to the State Supreme Court to review the decree rendered in the Supreme Court of Oregon dismissing his suit. The Supreme Court of Oregon had previously announced an opinion that the bonds would be purchased subject to and with notice of this litigation. Also Mr. Kiernan has a suit pending against the City of Portland and the pur-

chaser of the first \$250,000 of these bonds, in the Circuit Court of the State of Oregon for the County of Multnomah; also a suit against said parties in the United States Circuit Court for the District of Oregon.

On November 7, 1910, E. H. Rollins & Sons, N. W. Halsey & Co. and A. B. Leach & Co. jointly submitted the highest bid for these \$500,000 of bonds and submitted the proceedings to Mr. Charles B. Wood, an attorney of Chicago, for examination, and on December 6, 1910, Mr. Wood submitted to them a written opinion declining to approve the bonds, and readvertising these same bonds to be sold again on January 24, 1911. I enclose you a copy of Mr. Wood's opinion showing the illegality of these bonds, on file with the city auditor of the City of Portland.

I call your attention to the fact that in the first objection raised by Mr. Wood he states that it was not raised in the case of *Kiernan vs. The City of Portland*, 111 Pac. Rep. 379, and has not been adjudicated by the courts of Oregon. I understand from the newspapers that the city auditor has sent out statements that the Supreme Court of Oregon has decided the question the other way. The city auditor is in error in making any such statement.

I also call your attention to the fact that at the election of November 8, 1910, the voters of the State of Oregon adopted a tax amendment which is worthy of careful study by all persons before bidding on bonds in Oregon, which tax amendment reads as follows:

ARTICLE IX.

‘Section 1-a. No poll or head tax shall be levied or collected in Oregon; no bill regulating taxation or exemption throughout the state shall become a law until approved by the people of the state at a regular general election; none of the restrictions of the Constitution shall apply to measures approved by the people declaring what shall be subject to taxation or exemption, and how it shall be taxed or exempted, whether proposed by the legislative assembly or by initiative petition; but the people of the several counties are hereby empowered and authorized to regulate taxation and exemption within their several counties, subject to any general law which may hereafter be enacted.’

The validity of this tax amendment and what it means have not yet been adjudicated in the courts of Oregon. How will it affect the collection of bonds?

This letter is sent to you to give you the information herein contained, to consider in determining whether you wish to submit a bid for these bonds or not, and to give you notice of the actual condition of these bonds so that you will bid with full notice of the litigation pending against these bonds.

Yours truly,

(Signed) RALPH R. DUNIWAY,
Attorney for Frank Kiernan.”

On April 15, 1911, the plaintiff in error, acting by and through his attorney, R. R. Duni-

way, sent the telegram to Messrs. Story, Thorn-
dyke, Palmer & Dodge, attorneys at law of Bos-
ton, Massachusetts, in substance as follows:

"Hawkins, Delefield and Longfellow, attorneys of New York, gave Farson Son & Co. unfavorable opinion on Broadway bridge bonds. Farson has brought suit in the Federal Court here to recover his \$25,000 deposit from the city. Charles B. Wood, attorney, Chicago, gave E. H. Rollings & Sons opinion Broadway bridge bonds illegal on question not yet raised in any court. Kiernan has appealed to Oregon Supreme Court suit to require Ladd & Tilton Bank to return \$250,000.00 Broadway bridge bonds to city or pay face and interest of bonds; also raises question whether bonds can be sold at a discount and raise rate of interest. This case was decided bad on demurrer when court held complaint good on demurrer before. Kiernan has obtained writ of error and docketed his first case in United States Supreme Court. Expect to sue Shawmut National Bank in Federal Court next week for taxpayer on last bid and raise all question possible in litigation. Am mailing you letter and enclosures so that you will learn what litigation is pending against Broadway bridge bonds."

That notwithstanding said letters and telegrams and said vexatious litigation, the City of Portland disposed of seven hundred fifty thousand dollars of said bonds and awarded a sale of six hundred thousand more. The money

received for said bonds has and is being invested in the purchase of the landings, building of the piers and approaches and the superstructure of the bridge.

Deponent further states that by reason of said suits and said letters, telegrams and statements sent out by plaintiff in error, bond buyers were deterred from bidding upon said bonds, and that they were sold below their par value, to-wit, at the sum of 93.08 for the two hundred fifty thousand dollars of the bonds and the sum of 91.349 for the five hundred thousand dollars of the bonds, and at 93.669 for six hundred thousand dollars.

Deponent states upon information and belief that the depreciation of said bonds below par was due largely, if not entirely, to said vexatious litigation and said letters, telegrams and statements and advertisements made and circulated by said plaintiff in error, and deponent is also informed and believes that letters, telegrams and statements of similar import to those set forth above are now circulated for the purpose of preventing the further and other sale of bonds of said city necessary for the construction of said bridge.

NECESSITY OF IMMEDIATE CONSTRUCTION.

That the immediate construction of the

bridge is necessary for the reason that the last new bridge constructed across the Willamette River was constructed about the year 1893, when the population upon the east side of the river, which is largely the residence portion of the city, was about one-tenth of its present population, and all the bridges at the present time are greatly congested and are totally inadequate to meet the demands of the public in crossing said river. The necessity for the immediate construction of the bridge is shown by affidavits of divers persons familiar with the circumstances, hereto attached.

CURATIVE ACTS.

Deponent further states that in order that there might be no question in regard to the right of the city to sell and dispose of said bonds an act of the legislature of the State of Oregon was enacted, ratifying and confirming the action of the people of the City of Portland authorizing the construction of said bridge and the issue of bonds to pay therefor, a copy of which act of the legislature and the date of its passage is as follows:

General Laws of Oregon, 1911, Chapter 6. AN ACT

“To authorize the construction of a bridge known as the Broadway bridge, to be built across the Willamette River in the City of Portland, in the State of Ore-

gon, and to cure any errors or irregularities in the passage of the amendment to the charter of the City of Portland authorizing such bridge, and to validate and confirm the bonds issued or to be issued for the construction therefor.

Whereas, on June 7, 1909, the electors of the City of Portland, County of Multnomah, State of Oregon, passed an amendment to the charter of said city in pursuance of Article IV, Section 1 and Section 1a, and Article XI, Section 2, of the Constitution of the State of Oregon, authorizing the Council of the City of Portland, in the name of and under the corporate seal of said city, to issue and dispose of bonds of said city to an amount not exceeding \$2,000,000, to be known as the "bridge bonds of the City of Portland, series of 1909," for the purpose of constructing and building a bridge, known as the Broadway bridge, with appropriate approaches and terminals, and with a clearance of not less than 65 feet above high water mark and not less than 96.13 feet above low water mark, across the Willamette River in said city, from Broadway street at or near its intersection with Larabee street, on the east side of said river, and following the line of Broadway street, extended westerly in its present course, to a point at or near its intersection with Seventh street, on the west side of said Willamette River, thence southerly and easterly to a point at or near the intersection of Sixth and Irving streets; with power to condemn or purchase proper pier sites and

other property necessary for the construction of said bridge; and

Whereas, the Council of the City of Portland has heretofore passed an ordinance authorizing the issuance and sale of bonds in pursuance of such amendment; and

Whereas, \$250,000 of said bonds has already been sold and disposed of; and

Whereas, a portion of the property has already been purchased for the location of piers and for the construction of said bridge, and a further issue of \$500,000 of bonds has been authorized and attempted sale made thereof; and

Whereas, certain suits have been commenced involving the power and authority of said City of Portland to construct said bridge and to issue bonds for the payment thereof, to-wit: Frank Kiernan vs. The City of Portland (first suit), now pending on a motion for a rehearing in the Supreme Court after a decision in favor of said city; Frank Kiernan vs. The City of Portland (second suit), pending in the Circuit Court of Multnomah County, State of Oregon, involving the same questions as the first suit; Frank Kiernan vs. City of Portland, now pending in the United States Circuit Court for the District of Oregon, involving the same questions as said prior suits; and the Port of Portland vs. The City of Portland, now pending in the Circuit Court of Multnomah County, State of Oregon, involving similar questions. All of said suits raise questions as to the power and authority of the City of Portland to construct said bridge and to issue bonds therefor

without an act of the legislature of the State of Oregon authorizing, empowering and consenting to the construction thereof and to the issuance of bonds for that purpose; and

Whereas, on account of said suits and on account of the questions as to the authority to construct said bridge and to issue bonds therefor without an act of the legislature, said \$500,000 of bonds offered for sale were rejected; and

Whereas, the doubt as to the authority of the city to build said bridge and issue bonds therefor without an act of legislature has depreciated the value of said bonds; and

Whereas, the immediate construction of said bridge is an absolute necessity to the convenience, welfare and comfort of said city to meet the growth thereof,

Now, therefore, in order that all questions as to the authority of said city to construct said bridge and issue bonds may be set at rest,

Be it enacted by the people of the State of Oregon:

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1. That the City of Portland is hereby fully authorized and empowered to construct and build said Broadway bridge, with appropriate approaches and terminals, and with a clearance of not less than 65 feet above high water mark and not less than 96.13 feet above the city datum or low water mark, across the Willamette, a navigable river in said city, sub-

stantially as follows, to-wit: From Broadway street at or near its intersection with Larrabee street, on the east side of said river, and following the line of Broadway street, extending westerly in its present course, to a point at or near its intersection with Seventh street, on the west side of said Willamette River, thence southerly and easterly to a point at or near the intersection of Sixth and Irving streets in said city.

Section 2. The action of the electors of the City of Portland in the passage of said amendment to the charter, and the action of the Council of said city and of its Executive Board in constructing said bridge and purchasing and condemning property therefor, and in the sale of said bonds and in all further sale of bonds and in all acts performed or to be performed by the electors of said City of Portland and the Council of said city and its Executive Board towards, or in the aid of the construction of said bridge, are hereby fully authorized, ratified and confirmed.

Section 3. Any lack of authority and any illegality and any and all errors and irregularities in the passage of said amendment to the charter of said city, which amendment is known as Section 118 $\frac{1}{2}$ of said charter, and any lack of authority and any illegality and any and all errors and irregularities in the issuances of said bonds and all bonds heretofore and hereafter issued for the purpose of securing funds for the building and construction of said bridge and in the purchase and acquisition

of property for the location of piers and construction of said bridge are hereby cured and validated; and the issue and sale of and all such bonds, both before and after the passage of this act, and the purchase and acquisition of property for the location of piers for and the construction of said bridge and the construction and building of said bridge are hereby fully authorized and ratified and confirmed.

Section 4. Inasmuch as the construction of the Broadway bridge is a public necessity, it is hereby adjudged and declared that the status of affairs is such that this act is necessary for the immediate preservation of the public peace, health and safety, and excepted from the operation of the exercise of the referendum, an emergency is hereby declared to exist, and this act shall take effect and be in full force and effect from and after its approval by the governor.

Filed in the office of the secretary of state January 18, 1911."

Also, in order that objections made by the plaintiff in error in regard to the authority of the city to construct said bridge without the authorization of Congress of the United States, an act was passed by Congress ratifying and authorizing the construction of said bridge, a copy of which act of Congress is as follows:

AN ACT

"To authorize construction of the Broadway bridge across the Willamette River at Portland, Oregon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the City of Portland, in the County of Multnomah, State of Oregon, is hereby fully authorized and empowered to construct and build a bridge to be known as the Broadway bridge, with appropriate approaches and terminals with a clearance of not less than 65 feet above high water mark and not less than 93.13 feet above low water mark, city datum, across the Willamette, a navigable river, in said city, substantially as follows, to-wit: From Broadway street at or near its intersection with Larrabee street on the east side of said river, and following the line of Broadway street extended westerly in its present course to a point at or near its intersection with Seventh street on the west side of said river; thence southerly and easterly to a point at or near the intersection of Sixth and Irving streets in said city: Provided, that said bridge shall be constructed and maintained in accordance with the provisions of the act entitled 'An act to regulate the construction of bridges over navigable waters,' approved March 23, 1906.

Sec. 2. That any irregularities in the passage of the amendment to the charter of said city known as Section 118 $\frac{1}{2}$, and any errors or irregularities in the issuance of said bonds due to a lack of authority from Congress to build said bridge are hereby cured, and the issue of said bonds, both before the passage of this act and afterwards, is hereby fully authorized, rati-

fied and confirmed so far as a lack of authority from Congress to build such bridge is concerned.

Sec. 3. That the right to alter, amend or repeal this act is hereby expressly reserved.

Exhibits A, B, C, D, E, F, G and H are hereto attached and made a part hereof as though read into this affidavit in words, figures and signs.

FRANK S. GRANT.

Subscribed and sworn to before me this 30th day of June, 1911.

(Notarial seal.) WM. C. BENBOW,
Notary Public for Oregon.

Exhibit A.

(Title.)

State of Oregon, County of Multnomah, ss.

I, Joseph Simon, being first duly sworn, depose and say that I am the mayor of the City of Portland; that I am familiar with the public necessities of transportation across the Willamette River in said city, and that I know of my own knowledge that large sums of damage are being incurred by the people of both sides of said river, due to inadequate bridge facilities therein; that if the Broadway bridge were immediately constructed it would tend in a very large degree to the relief of the present

situation; that I regard any delay whatever in the immediate construction of the Broadway bridge as a special calamity to the city and its business. That the Burnside bridge was the last new bridge constructed across the Willamette River, and it was completed in the year 1893; that the Morrison bridge was enlarged in 1905, but in my opinion the growth of the traffic between the two parts of the city has so increased that even the completion of the Madison street bridge and the reconstruction of the steel bridge will still leave the city with totally inadequate facilities to cross the river, and that the immediate construction of the Broadway bridge is necessary to the relief of the people of this city.

JOSEPH SIMON.

Subscribed and sworn to before me this 25th day of October, 1910.

JOHN F. CAHALIN,

Notary Public for Oregon.

(Notarial seal.)

Exhibit B.

(Title.)

State of Oregon, County of Multnomah, ss.

I, A. L. Barbur, being first duly sworn on my oath, depose and say: That I am now and at all the times herein referred to was the duly elected, qualified and acting auditor of the City of Portland, Oregon, and as such auditor

I have now and at all of said times have had the custody, care and control of the records, documents and proceedings of the Council of said city and the committees of said Council; that on April 13, 1910, the Council of said city, by motion duly adopted, directed me as auditor of said city to readvertise for proposals for the sale of \$250,000.00 worth of Broadway bridge bonds so that said proposals could be open May 23, 1910; that an advertisement was made for such proposals, the same to be open upon said date, but no bids were received, and thereupon on July 13, 1910, said Council being in session, duly adopted a resolution authorizing me, as auditor, to advertise for the sale of \$250,000.00 of the Broadway bridge bonds, which resolution was offered by Councilman Menefee, and the same was duly seconded, carried and adopted on said date; that I, as such auditor, advertised for proposals as directed, and thereupon, on August 29, 1910, at 2 o'clock p. m., I received and opened bids as follows:

Hibernia Savings Bank (32 bids), at 93 and interest, aggregating the sum of	\$ 47,500.00
Woodard, Clarke & Co, 93 and inter- est	1,000.00
Meier & Frank Company, 93 and in- terest	25,000.00
Irvington Investment Co., 92 and in- terest	5,000.00
Woodmen of the World, 91.88 and interest	50,000.00
Joseph Simon, 93 and interest.....	2,500.00

Joseph Simon, 93 and interest.....	5,000.00
Merchants Loan and Trust Co., Chicago, \$232,650.00 and interest for	250,000.00
United States National Bank, 93 and interest	5,500.00
Merchants National Bank, 93 and interest	2,000.00
Ukase Investment Co., 93 and interest	10,000.00
Ukase Investment Co., 94 and interest	10,000.00
Ukase Investment Co., 95 and interest	5,000.00
Women of Woodcraft, 91.81 and interest	10,000.00
Olds, Wortman & King, par and accrued interest	2,500.00
Ladd & Tilton, 93.08 and interest...	250,000.00
R. E. Menefee, 93 and interest.....	1,000.00
Gay Lombard, 93 and interest.....	2,500.00
O'Connor & Kahler, 92.31 and interest	250,000.00

Thereupon I reported to the Council of said city, under date of August 30, 1910, the list of said bids received and opened, as aforesaid, for said bonds; that at a regular meeting of said Council on the 31st day of August, 1910, on motion of Councilman Menefee, duly seconded and carried, the \$250,000.00 Broadway bridge bonds were awarded to Ladd & Tilton at 93.08 on the dollar, Ladd & Tilton being the highest responsible bidder.

A. L. BARBUR.

Subscribed and sworn to before me this 25th day of October, 1910.

JOHN F. CAHALIN,

Notary Public for Oregon.

(Notarial seal.)

Exhibit C.

(Title.)

State of Oregon, County of Multnomah, ss.

I, D. G. Brunger, being first duly sworn, on my oath depose and say: That I am pilot on the ferry boat W. S. Mason, operated by the County of Multnomah in the Willamette River north of the steel bridge from the foot of East 7th street, on the west side, to Albina avenue, on the east side, in the City of Portland, and have been for twenty years last past; that the following statement of passengers and teams is a true and correct copy of the log book kept by me:

Dates.	Number of Passengers.
October 10th.....	1610
October 11th.....	1583
October 12th.....	1627
October 13th.....	1563
October 14th.....	1621
October 15th.....	1657

Dates.	No. of Teams.
August 10th.....	787
August 11th.....	726
August 12th.....	648
August 13th.....	649
August 15th.....	795
August 16th.....	754
August 17th.....	805

D. C. BRUNGER.

Subscribed and sworn to before me this 25th day of October, 1910.

JOHN F. CAHALIN,

Notary Public for Oregon.

(Notarial seal.)

Exhibit D.

(Title.)

State of Oregon, County of Multnomah, ss.

I, Fred Cooper, being first duly sworn, on my oath depose and say: That I am superintendent of transportation of the Portland Railway, Light and Power Company, and have been employed in that position for several years; that at the request of Frank S. Grant, city attorney of Portland, Oregon, I prepared the annexed three sheets showing the number of cars operated by said railway company across the Burnside bridge, Morrison bridge and steel bridge in the City of Portland, Oregon, on October 10, 1910; that this day was selected by me as a representative day, and that the figures therein stated are true, as I verily believe, and according to our records now on file in the office of the said company.

FRED COOPER.

Subscribed and sworn to before me this 26th day of October, 1910.

B. F. BOYNTON,
Notary Public for Oregon.

(Notarial seal.)

Number of cars crossing steel bridge by lines and the number of passengers carried on steel bridge lines October 10, 1910:

Line.	Cars.	Number Passengers Carried.
Upper Albina (U).....	342	8,755

Lower Albina (L)*.....	342	13,361
Irvington	156	2,477

*Kenton included with Lower Albina.

Number of cars crossing Burnside street bridge by lines and the number of passengers carried on Burnside bridge lines October 10, 1910:

Line.	Cars.	Number
		Passengers Carried.
St. Johns	138	11,165
Vancouver	44	3,194
Woodlawn	280	8,733
Alberta	280	10,682
Montavilla	216	8,231
Broadway	130	5,061
U. trippers	96	*

*Union avenue trippers are included in Woodlawn and Alberta lines.

Number of cars crossing Morrison street bridge by lines and the number of passengers carried on Morrison bridge lines October 10, 1910:

Line.	Cars.	Number
		Passengers Carried.
East Ankeny and Rose City	236	9,401
W-W, W-R and trps.....	330	(W-W) 7,767
		(W-R) 5,176
Brooklyn	160	4,532
Mt. Tabor	230	
Sunnyside	282	22,882
O. W. P. transfer.....	344	15,147

Exhibit E.

(Title.)

State of Oregon, County of Multnomah, ss.

I, W. E. Garretson, being first duly sworn, depose and say: That I am over the age of 21 years, and live and have my residence on the East Side in Portland, Ore., and am obliged to cross the bridges from two to four times each day to carry on my business. That I have been delayed in reaching my business from 10 to 20 minutes every few days by lack of bridge facilities, and that by reason of such delays I have lost considerable sums of money in my business, and there are many thousand people that I know of my own personal knowledge who have been delayed in the same way; that if the Broadway bridge were constructed in accordance with the plans set out in the amendment to the Charter of the City of Portland there would be no occasion for delay by reason of the open draws, as very few boats would require the Broadway bridge to be opened.

That I am acquainted with the City of Portland, and with the East Side; that the Burnside bridge was completed in 1893, and was the last new bridge built across the Willamette river in said city, and I say, from my own knowledge, that in the year 1893, when the last bridge was constructed, the population of East Portland and Albina, or the East Side, was approximately 20,000 persons; that the population of the

East Side has increased from that number to the number of approximately 120,000 persons at the present time; and that at the rate of growth by the time the Broadway bridge can be completed, if the construction should commence at once, the population of the East Side will be 160,000 persons. That the traffic and business across the river has increased at a greater ratio than the increase in the population and that the congestion of traffic caused by the lack of bridge facilities in the said city has caused the residents of the East Side. and the public generally, great delay and cost them large sums of damage, to my personal knowledge.

W. E. GARRETSON.

Subscribed and sworn to before me this 25th day of October, 1910.

JOHN F. CAHAJIN,

Notary Public for Oregon.

(Notarial seal.)

Exhibit F.

(Title.)

State of Oregon, County of Multnomah, ss.

We, W. C. North, L. E. Sauvire, D. E. Bomgardner, C. W. Jones and Theodore Rowland, each being first duly sworn, on oath depose and say: That we are citizens of the State of Oregon, and taxpayers of and reside in the City of Portland, Oregon; that our residences are in that portion of the city which lies east of the

Willamette river and north of Sullivan's gulch, and in the territory tributary to the proposed Broadway bridge; that the said bridge is an absolute necessity for the welfare of that large portion of the said City of Portland which lies east of the Willamette river and north of Sullivan's gulch; that in said territory in said portion of the city there are resident approximately 65,000 inhabitants; that the City of Portland now comprises a population of about 225,000 people; that of said population approximately 75 per cent thereof reside on the east side of the Willamette river; that on the west side of the Willamette river are located the principal business houses and hotels, the banks, the Union depot from which the trains coming in to and departing from the city arrive and depart; the courthouse, city hall and the great portion of the business concerns; that on the west side of the river are also located the most of the saw-mills and manufacturing establishments which employ labor; the large department stores, business and professional offices in which large numbers of young women and girls are employed, are located on the west side of the river; that these conditions render necessary that the greater portion of the population of Portland crosses the Willamette river both morning and evening in coming to and from their homes and occupations; that at the present time this large section of the City of Portland which will be affected by the construction of the Broadway bridge is served by the present Steel bridge,

an old weak structure so unsubstantial that the railroad companies do not trust the weight of their heavy locomotives on it; the Burnside bridge is also carrying from two to three times the weight of traffic that it was designed to bear; the same is true, also, of the Morrison street bridge, which serves a very populous portion of the East Side; that with the rapid growth of Portland approximately 80 per cent of the increase in population goes to the east side of the river; this renders the congestion on the bridge the more acute; the steamboat traffic on the Willamette river within the limits of the City of Portland is also increasing greatly, and as the increased traffic across the river necessitates a constantly increasing use of the bridge, the steamboat traffic is demanding a constantly increasing use of the draw; this has caused and is causing a very great inconvenience, and the situation is a grave one; it was to relieve those conditions that the Broadway bridge was designed; its design is such as to permit the unobstructed use of the river by the large steamboats at all stages of water, the draw only being required to be opened for ocean-going craft; the population in that portion of the city to be served by this bridge is increasing at so rapid a rate that by the time this bridge can be completed and in readiness for use, it will scarce serve to accommodate the immense traffic that will use it; an attempt has been made to secure temporary relief by the action of the County Court of Multnomah county, in closing the

draws to steamboat traffic at certain periods in the morning and evening of each day; this, however, has caused a strong protest from the shipping interests, who claim that the action is injuring the harbor of Portland; this relief, however, is temporary in its nature, and only helps to the extent that it permits constant use of the present bridges during those hours, and does not at all look to making provision for the future when the present bridges will be rendered unsuccessful; the great increase in population of the City of Portland during the past few years, and the present rapid growth of the city, make the requirement for additional bridge facilities very urgent; a great proportion of this increase in population is in that portion of Portland known as the peninsula, which lies between the Willamette and Columbia rivers, and which will be served by the proposed Broadway bridge; large manufacturing establishments are developing along the Columbia river and in St. Johns, and the growth of the city's population in this section is very rapid; the weak and unsafe condition of the Steel bridge and the heavy burden that the Burnside bridge is compelled to carry, will render the Broadway bridge an absolute necessity before it can be completed and open for traffic; that a situation exists of extreme importance to a large portion of the public that the construction of the bridge has been interfered with and interrupted by adverse litigation, and the constant delays have been such as to jeopardize the public interest; that in our

opinion a further restraining order would injure property values, inconvenience the public, render traffic to and fro across the river extremely difficult, and would in many ways partake of the nature of a public calamity.

W. C. NORTH.

L. E. SAUVIR.

D. E. BOMGARDNER.

C. W. JONES.

THEODORE ROWLAND.

Subscribed and sworn to before me this 25th day of October, A. D. 1910.

MARTIN T. PRATT,

Notary Public for Oregon.

(Notarial Seal.)

Exhibit G.

Be it remembered, that at a regular term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County courthouse in the City of Portland, in said county and state on Monday, the 2d day of May, A. D. 1910, the same being the first Monday in said month, and the time fixed by law for holding a regular term of said court.

Present, Hons. Earl C. Bronaugh, Robert G. Morrow, John B. Cleland and C. U. Gantenbein and William N. Gatens.

Whereupon, on this Saturday, the 21st day of May, A. D. 1910, the same being the 18th judicial day of said term of said court, among other proceedings the following was had, to-wit:

In the Circuit Court of the State of Oregon,
County of Multnomah.

City of Portland, plaintiff,)	
vs.)	Judgment
Maria L. Flanders, Albers Bros.)	B 5927.
Milling Co., a corporation, de-)	
fendants.)	

This cause came on regularly for trial on the 16th day of May, 1910, the plaintiff appearing by J. P. Kavanaugh, City Attorney, and H. H. Riddell, its attorneys, and the defendants appearing by Henry E. McGinn and R. Citron, their attorneys. And said cause having been tried before the court and a jury duly empaneled, and it appearing that it was necessary for the plaintiff to acquire and secure the title to the land hereinafter described, for a bridge known as the Broadway bridge, about to be constructed, in the City of Portland, County of Multnomah, State of Oregon, on and over the lands hereinafter set forth belonging to the defendants, and that it is necessary for the plaintiff to secure and acquire said property to properly erect and construct said bridge on and over said lands and the courts so finding; and it further appearing to the court upon the issues joined in said cause and the trial thereof in this court that defendant Maria L. Flanders, is and for a long time past was the owner of the fee simple in said lands, and that the defendants Albers Bros. Milling Co. have now a leasehold interest in the whole of said lands for the term of about twenty-four (24) years which said lands

are situate in the City of Portland, County of Multnomah, State of Oregon, and are particularly described as follows:

Parts of lots one (1) and two (2) in block three hundred and eighteen (318) of Couch's Addition to the City of Portland; commencing at a point in the center line of Seventh street 119.50 feet north 1 degree 27 minutes west from the north line of Kearney street, said point being the intersection of the center line of Broadway of Elizabeth Irving's Addition to East Portland if extended south 51 degrees 32 minutes west its present course; thence north 51 degrees 32 minutes east along the center line of said Broadway if extended, 519.31 feet to the east line of North Front street and the place of beginning of the tract of land to be described; thence north 39 degrees 57 minutes west along the east line of North Front street 35.01 feet; thence north 51 degrees 32 minutes east 234.88 feet to the westerly harbor line of the Willamette river; thence south 44 degrees 9 minutes east along said harbor line 70.34 feet; thence south 51 degrees 32 minutes west 240.02 feet to the east line of North Front street; thence north 39 degrees 57 minutes west 35.01 feet to the place of beginning.

And it further appearing to the court that upon the trial of this cause said jury empaneled and accepted to try the same returned into court on the 21st day of May, 1910, and rendered their verdict herein on said day which was duly filed, wherein and whereby said jury found and determined the damages resulting to the defendant,

Maria L. Flanders, by reason of the appropriation of said lands to the plaintiff, was and is the sum of thirty-seven thousand nine hundred and nine (\$37,909) dollars, and that the damages resulting to defendants, Albers Bros. Milling Co., by reason of the appropriation of said lands to the plaintiff, was and is the sum of thirty-nine thousand and ninety-one (\$39,091) dollars; said verdict being in words and figures as follows:

“In the Circuit Court of the State of Oregon. County of Multnomah.

City of Portland, plaintiff,)	
vs.)	
Maria L. Flanders, Albers Bros.))	Verdict.
Milling Co., a corporation, de-))	
fendants.)	

We, the jury in the above entitled cause, hereby assess the damages to defendant Maria L. Flanders (owner) in the sum of thirty-seven thousand nine hundred and nine (\$37,909) dollars; and we also hereby separately assess the damages of the defendants Albers Bros. Milling Co. (lessees) in the sum of thirty-nine thousand and ninety-one (\$39,091) dollars. Total of above, \$77,000. DAVID N. ANDERSON,

Foreman.”

Now, therefore, in consideration of the premises, it is ordered, adjudged and decreed, that the said land hereinbefore particularly described, and the title to the same as it obtained and existed upon the date of the filing of the complaint

in this case, be and the same is hereby appropriated and taken from the said defendants to this plaintiff, upon the deposit by the plaintiff in court, of warrants duly made by the proper authorities of said City of Portland, duly drawn upon the Treasurer of the City of Portland for said sum of \$37,909 payable to the defendant Maria L. Flanders, and for the sum of \$39,091 payable to the defendants Albers Bros. Milling Co., and that any and all persons interested and any and all persons claiming by, through or under defendants or either of them, be and they are hereby barred from any further right, title or interest in or to the said property, or any part thereof, upon the payment into this court and deposit with the clerk thereof of the said sum of \$77,000 in the manner aforesaid, being the amounts awarded by said verdict.

It is further ordered and adjudged that the defendants have and recover of and from the plaintiff their costs and disbursements taxed at \$———.

C. U. GANTENBEIN,

Circuit Judge.

State of Oregon, County of Multnomah, ss.

I, F. S. Fields, County Clerk of the above named county and state, and ex-officio clerk of the Circuit Court of the County of Multnomah, State of Oregon, do hereby certify that the foregoing copy of judgment order has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of said original judgment order as the same appears

of record in my office and in my care and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 12th day of October, A. D. 1910.

F. S. FIELDS, Clerk.

H. C. SMITH, Deputy.

(Official seal.)

Exhibit H.

(Title.)

State of Oregon, County of Multnomah, ss.

We, D. L. Povey, M. G. Munly, A. B. Manley, H. A. Heppner and F. Richet, each being first duly sworn on oath depose and say that I am a citizen of the State of Oregon, and am a taxpayer of and reside in the City of Portland, Oregon; that my residence is in that portion of the city which lies east of the Willamette river and north of Sullivan's gulch, and in the territory tributary to the proposed Broadway bridge; that the said bridge is an absolute necessity for the welfare of that large portion of the said City of Portland which lies east of the Willamette river and north of Sullivan's gulch; that in said territory in said portion of the city there are resident approximately 65,000 inhabitants; that the City of Portland now comprises a population of about 225,000 people; that of said population approximately 70 per cent thereof reside on the east side of the Willamette river; that on the

west side of the Willamette river are located the principal business houses and hotels, theaters, the banks, the Union depot from which the trains coming in to and departing from the city arrive and depart; the courthouse, city hall, and the great portion of the business concerns; that on the west side of the river are also located the most of the sawmills and manufacturing establishments which employ labor; the large department stores, business and professional offices in which large numbers of young women and girls are employed, are located on the west side of the river; that these conditions render necessary that the greater portion of the population of Portland cross the Willamette river both morning and evening in coming to and from their homes and occupations; that at the present time this large section of the City of Portland which will be affected by the construction of the Broadway bridge is served by the present Steel bridge, an old, weak structure so unsubstantial that the railroad companies do not trust the weight of their heavy locomotives on it; the Burnside bridge is also carrying from two to three times the weight of traffic that it was designed to bear; the same is true, also, of the Morrison street bridge, which serves a very populous portion of the East Side; that with the rapid growth of Portland, approximately 80 per cent of the increase in population goes to the east side of the river; this renders the congestion on the bridges the more acute; the steamboat traffic on the Willamette river within the limits of the City

of Portland is also increasing greatly, and as the increased traffic across the river necessitates a constantly increasing use of the bridges, the steamboat traffic is demanding a constantly increasing use of the draws; this has caused and is causing a very great inconvenience and the situation is a grave one; it was to relieve these conditions that the Broadway bridge was designed; its design is such as to permit the unobstructed use of the river by the large steamboats at all stages of water, the draw only being required to be opened for ocean-going craft; the population in that portion of the city to be served by this bridge is increasing at so rapid a rate that by the time this bridge can be completed and in readiness for use, it will scarce serve to accommodate the immense traffic that will use it; an attempt has been made to secure temporary relief by the action of the County Court of Multnomah County, in closing the draws to steamboat traffic at certain periods in the morning and evening of each day; this, however, has caused a strong protest from the shipping interests, who claim that the action is injuring the harbor at Portland; this relief, however, is temporary in its nature and only helps to the extent that it permits constant use of the present bridges during those hours, and does not at all look to making provision for the future when the present bridges will be rendered unsuccessful; the great increase in population of the City of Portland during the past few years and the present rapid growth of the city, make the

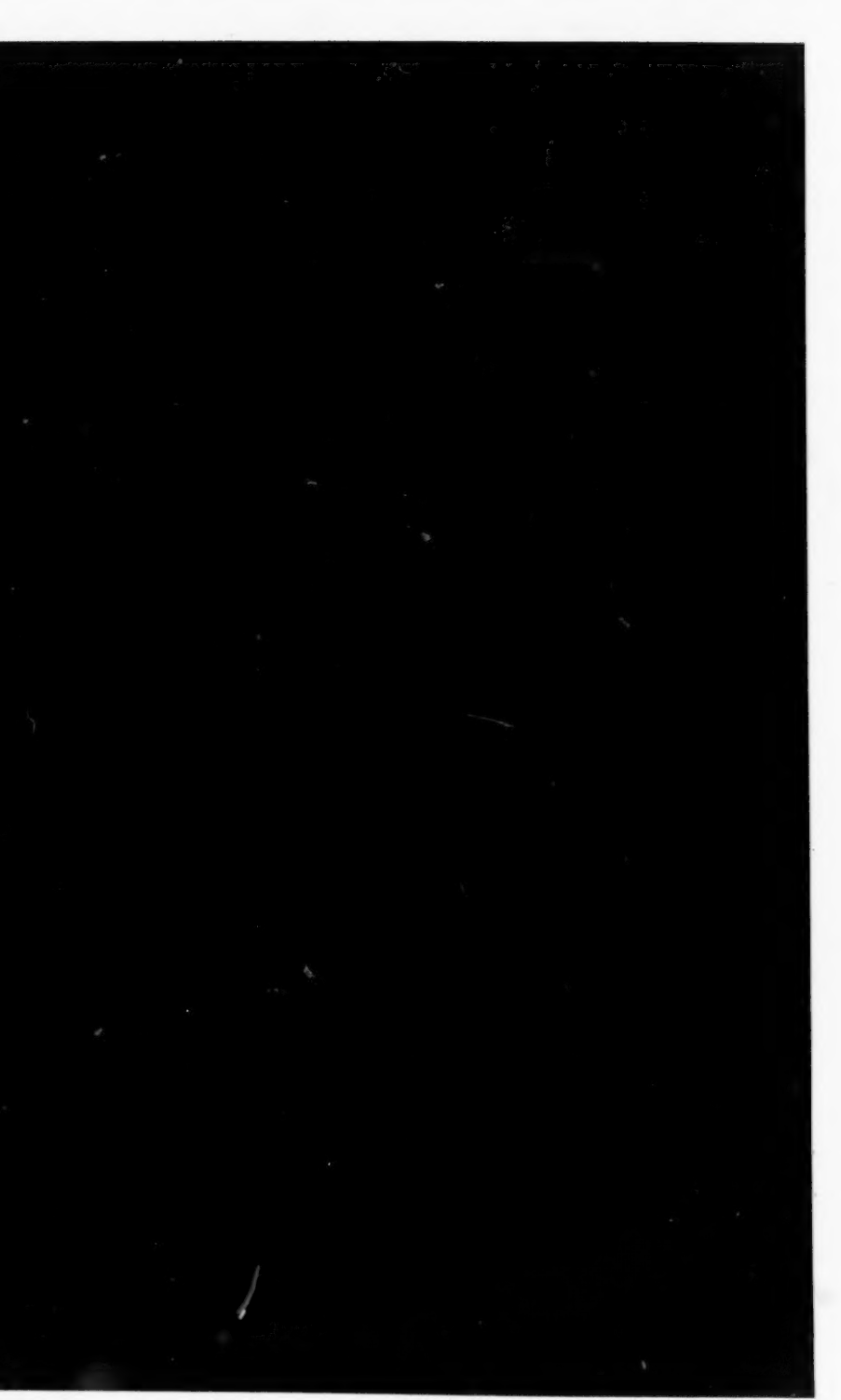
requirement for additional bridge facilities very urgent; a great proportion of this increase in population is in that portion of Portland known as the peninsula, which lies between the Willamette and Columbia rivers, and which will be served by the proposed Broadway bridge; large manufacturing establishments are developing along the Columbia river and in St. Johns, and the growth of the city's population in this section is very rapid; the weak and unsafe condition of the Steel bridge and the heavy burden that the Burnside bridge is compelled to carry will render the Broadway bridge an absolute necessity before it can be completed and open for traffic; that a situation exists of extreme importance to a large portion of the public that the construction of the bridge has been interfered with and interrupted by adverse litigation, and the constant delays have been such as to jeopardize the public interest; that in our opinion a further restraining order would injure property values, inconvenience the public, render traffic to and fro across the river extremely difficult, and would in many ways partake of the nature of a public calamity.

DAVID L. POVEY,
M. G. MUNLY,
A. B. MANLEY,
H. A. HEPPNER,
F. RICHET.

Subscribed and sworn to before me this 18th day of October, 1910.

H. H. RIDDELL,
(Notarial seal.) Notary Public for Oregon





IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1910

NO. 896

FRANK KIERNAN, PLAINTIFF IN ERROR

VS.

THE CITY OF PORTLAND, A MUNICIPAL CORPORATION
JOSEPH SIMON, MAYOR OF THE CITY OF PORTLAND
A. L. BARBUR, AUDITOR OF THE CITY OF PORTLAND
AND JOSEPH BUCHEL, DEFENDANTS IN ERROR

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

The Council of the City of Portland, on October 27th, 1909, attempted to pass Ordinance No. 20208 for the issuance of \$250,000 bonds of City of Portland to be used in building what is called the Broadway Bridge across the navigable Willamette River in the City of Portland, County of Multnomah, State of Oregon.

This ordinance was attempted to be passed by the Council of City of Portland, because it claimed that the charter of the City of Portland had been amended by the electors of the City of Portland at the city election held June 7th, 1909, by adopting what is known as Section 118½ of the charter of the City of Portland, which Section 118½ attempted to authorize the city to build said Broadway Bridge across said navigable Willamette River and the issuance of \$2,000,000 of thirty-year, four per cent bonds of the City of Portland, to pay for the same, and to require the County of Multnomah, State of Oregon, to operate and maintain said bridge.

The right of the electors of the City of Portland to amend the charter and adopt said Section 118½ is claimed to be conferred by the following amendments to the constitution of the State of Oregon:

Article IV., Section 1-A.—"The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act, shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation of every character, in or for their respective municipalities and districts. The manner

of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum nor more than fifteen per cent to propose any measure, by the initiative in any city or town."

The above constitutional provision was proposed by initiative petition filed in the office of the Secretary of State, February 3d, 1906, and adopted by vote of the people 47,678 for and 16,735 against, June 4th, 1906. It went into effect by proclamation of the Governor, issued June 25th, 1906.

Constitution of Oregon, Article XI, Section 2.

—"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal, any charter or act of incorporation of any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the State of Oregon."

The above constitutional provision was proposed by initiative petition filed in the office of the Secretary of State, February 3d, 1906, and adopted by the vote of the people 52,567 for and 19,852 against, June 4th, 1906. It went into effect by proclamation of the Governor, issued June 25, 1906.

The right of the electors of the State of Oregon to adopt said amendments to the constitution

of the State of Oregon (Article IV., Section 1-A, and Article XI., Section 2), is claimed to be conferred by the following amendment to the constitution of the State of Oregon:

Article IV., Section 1.—"The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and a house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is de-

manded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: "Be it enacted by the people of the State of Oregon." This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor."

The above section is an amendment to the original constitution and was adopted by the twentieth legislative assembly; adopted by the twenty-first legislative assembly; adopted by the people by vote, 62,029 for to 5668 against it, June 2, 1902.

The pretended Section 118 $\frac{1}{2}$ of the charter of the City of Portland is as follows:

"To amend Article VI. of Chapter III. of the charter of the City of Portland, entitled, 'An act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State, January 23d, 1903, by inserting a section in said Article VI., Chapter III., after Section 118 and before Section 119 thereof, which shall be designated in the charter as Section One Hundred Eighteen and One-half (118½) of Article VI., of Chapter III.

Be It Enacted By the People of the City of Portland, and the City of Portland Does Ordain as Follows:

Section 1. That Article VI., of Chapter III., of the charter of the City of Portland, entitled, "An act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the Secretary of State, January 23d, 1903, be, and the same is hereby amended by inserting the following section in said Article VI., of Chapter III., after Section 118 and before Section 119 thereof, which shall be designated in the charter as Section One Hundred Eighteen and One-half (118½) of Article VI., of Chapter III.

Section 118½. The Council of the City of Portland is hereby authorized in the name of and under the corporate seal of said city to issue and dispose

of bonds of said City of Portland to an amount not exceeding two million dollars, of the denominations of five hundred dollars, or one thousand dollars, as the Council may determine, and in such form as the said Council may select, with interest coupons attached thereto. The said bonds shall be signed by the Mayor and countersigned by the Auditor of said City of Portland, and each of said coupons shall have the signatures of the Mayor and Auditor of the City of Portland engraved thereon, whereby the City of Portland shall be held and considered in substance and effect to undertake and promise in consideration of the premises, to pay to the bearer of each of said bonds, at the expiration of thirty years from the date thereof, the sum named therein in gold coin of the United States, together with interest thereon in like gold coin at the rate of four per centum per annum, payable half yearly as provided in said coupons. The bonds issued in pursuance of the authority hereby granted shall be known as the "Bridge Bonds of the City of Portland, Series 1909." The bonds herein provided for and authorized to be issued, shall be advertised and sold to the highest responsible bidder. The Council may at its discretion reject any and all bids tendered for such bonds and proceed to re-advertise the same when the bids are not satisfactory. The Treasurer of the City of Portland, Oregon, shall have the care and custody of all moneys received from the sale of said bonds, or otherwise, and shall pay out the same on warrants of the

Mayor countersigned by the Auditor and not otherwise. All expenses connected with the purchase or condemnation of any property, easement, franchise, or rights, and the expense of the bonds issued as herein authorized, and the cost of the bridge herein provided for, with its approaches, terminals and necessary accessories, are to be paid out of the proceeds of the sale of said bonds.

From the fund herein provided for the executive board of the City of Portland, Multnomah County, State of Oregon, and its successors in office, is hereby authorized and empowered in the name of the City of Portland, to construct and build a bridge with appropriate approaches and terminals and with a clearance of not less than 65 feet above high water and not less than 96.13 feet above the city datum or low water mark, across the Willamette River in said city, from Broadway Street, at or near its intersection with Larrabee street on the east side of the river, and following the line of Broadway Street, extended westerly in its present course to a point at or near its intersection with Seventh Street on the west side of said Willamette River; thence southerly and easterly to a point at or near its intersection of Sixth and Irving streets, and it shall have full power and authority subject to such regulations as may be imposed by the United States, to build, erect and construct piers, abutments, and other necessary supports in the bed on the Willamette River for the foundation of such a bridge.

The location of the west approach and incline of said bridge shall be subject, however, to such

modification and change as may be deemed expedient by said executive board or its successors in office.

The said executive board or its successors in office, for the purpose of carrying into effect the provisions of this section, is hereby authorized and empowered to appropriate and condemn in the name of the City of Portland for the public use, any property occupied by or abutting on said streets, Bridge, site approaches, or terminals, or necessary or which may be required for the conduits, approaches, structures, superstructures, leases, railroad tracks and railroad property, railway wires, rights of way, roadways, telephone, telegraph and electric light wires, which said executive board or its successors may require to carry into effect the purposes of this section, and such property may be entered upon and examined, surveyed, selected, condemned and appropriated in the mode provided by the charter of the City of Portland, or by the statutes of the State of Oregon, for the appropriation of property for public use or corporate purposes. And for the purpose of carrying the provisions of this section into effect, the executive board of the City of Portland or its successors in office, is authorized and empowered to appropriate and use the whole or any part of any of the public streets or highways of the City of Portland or to establish or alter the grades thereof. All railway tracks laid upon said bridge or upon its approaches of terminals shall forever remain the exclusive

property of the City of Portland and no exclusive privilege or franchise shall be granted to any person, railway company, or other public service corporation, for the use of the whole or any part of such bridge, approaches or terminals. And all of such privileges or franchises that may be granted by the City of Portland for the use of the whole or any part of such bridge, approaches or terminals, shall be granted upon such compensation to the city as may be determined by the Council of the City of Portland or its successors in office. After the construction of such bridge, the executive board or its successors in office, shall surrender and deliver the possession of the same to the County Court of Multnomah County, State of Oregon, and such court shall operate, control and manage the same and keep the same in repair in the same manner as other bridges crossing the Willamette River within the City of Portland are operated, controlled and managed, as required by law.

All acts and parts of acts in conflict herewith are hereby repealed to the extent that they may conflict with the provisions hereof."

About November 1, 1909, the plaintiff in error as a taxpayer of the City of Portland brought this suit in equity in the Circuit Court of the State of Oregon for the County of Multnomah, to enjoin the defendants from proceeding to issue bonds, levy taxes and build said Broadway Bridge, alleging that the Ordinance No. 20208 was too broad and was not authorized by the pretended Section 118½ of the

charter; also that there was not any Section 118 $\frac{1}{2}$ to be adopted to the charter; also that there was not any Section 118 $\frac{1}{2}$ of charter adopted in the **mode** and **manner** provided by the laws of Oregon; also that said pretended Section 118 $\frac{1}{2}$ of the charter did not authorize and could not authorize the city to do what it was attempting to do; also that the said Ordinance No. 20208 and said pretended Section 118 $\frac{1}{2}$ of the charter, Article IV., Section 1-A.; Article XI., Section 2, and Article IV., Section 1, of the constitution of Oregon, were each and all in violation of sections 3 and 4 of Article IV.; also Section VI.; also Section 1 of the XIV. amendment of the constitution of the United States, and void.

The Federal questions are shown on the face of the record and the Circuit Court dismissed the suit on June 14, 1910, and held that there was no higher law than acts passed by the people under the "Oregon system" and failed to give force and effect to the above mentioned provisions of the constitution of the United States.

Plaintiff in error appealed to the Supreme Court of the State of Oregon and the case was affirmed in the Supreme Court of the State of Oregon, October 31, 1910, after the Supreme Court of the State of Oregon attempted to amend the above mentioned constitutional amendments to the constitution of Oregon by construction; also said Section 118 $\frac{1}{2}$, and the Supreme Court of Oregon held that said constitutional amendments as amended by

the construction of the Supreme Court of Oregon, and said Section 118½ of the charter, as amended by judicial construction were the law of the land and failed to give force and effect to the above mentioned provisions of the constitution of the United States.

(Rec. pp.)

111 Pac. R. 379.

112 Pac. R. 402.

The plaintiff in error then sued out a writ of error to this United States Supreme Court and the case is now for trial in the United States Supreme Court upon the Federal questions involved in the record of this case.

Plaintiff in error relies upon and intends to urge the assignment of errors, which are in substance that the initiative and referendum amendments to the Constitution of Oregon, the pretended Section 118½ of the charter of City of Portland, and said pretended Ordinance No. 20208, are each and all invalid because they violate the Federal Constitution invoked by the complaint and specified in the assignment of errors to this court.

These Federal issues are squarely presented in this case:

1. Can the State of Oregon legally adopt the initiative and referendum amendment to its constitution, Article IV, Section 1, attempted to be adopted June 2, 1902, and printed above, pages . . . ?

2. Can the electors of the State of Oregon legally adopt the further initiative and referendum amendments to its Constitution, Article IV, Section 1-A, and Article XI., Section 2, attempted to be adopted June 4, 1906 by virtue of said Article IV, Section 1, and printed above, pages ...?

3. Can the electors of City of Portland legally adopt the pretended Section 118 $\frac{1}{2}$ of the charter of City of Portland, which is printed above in this brief, pages . . . , by virtue of the above mentioned initiative and referendum amendments to the Oregon constitution?

4. Can the City of Portland legally issue bonds, tax plaintiff in error, and build said Broadway Bridge across the navigable Willamette River, owned by the State of Oregon, by virtue of the said Section 118 $\frac{1}{2}$ of charter, attempted to be adopted at said city election under said system of government?

5. The Supreme Court of Oregon committed error in deciding that the pretended Section 118 $\frac{1}{2}$ is invalid in so far as it attempts to impose the care and maintenance of the Broadway Bridge upon Multnomah County and then holding that said clause is severable from the rest of the section, and the remainder of the section is valid, as thereby the Supreme Court of Oregon attempted to legislate and authorize the taxation of plaintiff in error and deprived him of the law of the land.

6. The Supreme Court of Oregon committed error in deciding that the granting of a franchise and building a bridge across the Willamette River,

owned by the State of Oregon and controlled jointly by the United States of America and State of Oregon, is a municipal purpose, instead of a state purpose and can be granted by the electors of the City of Portland in amending the charter of the City of Portland under said "Oregon system," as said decision denied to plaintiff in error the law of the land.

7. The Supreme Court of Oregon committed error in deciding that the Council and electors of the City of Portland can enact a charter amendment to the charter of the City of Portland, under said "Oregon system," by which the city could issue bonds in a large amount and tax the property of plaintiff in error for the payment of the bonds as a municipal purpose, when it is a state purpose, and it is not within the constitutional power of the people of the State of Oregon to delegate the power to tax without limitation and exercise state powers to the electors of a municipality, and the attempt to do so is in violation of Section 1 of the XIV. amendment to the constitution of the United States; also in violation of sections 3 and 4 of Article IV. of the constitution of the United States of America, as such grant of power would be for the State of Oregon to commit state suicide and dissolve the State of Oregon into as many smaller states as there are municipalities within the state and to change the Republican government of the State of Oregon into a confederacy of cities within the State of Oregon, and tends to destroy our system of government created and guaranteed by the Constitution of the United States of America.

8. The Supreme Court of Oregon erred in holding and deciding that plaintiff, a citizen of the United States, must conform his conduct and hold his property in state matters and tax matters, to a rule of conduct or law enacted by mere numbers of people and assemblages of people within the borders of a municipality, because it is not in accordance with due process of law and is in violation of the law of the land to require any citizen of the United States to conform his conduct, and hold his property in state matters and in tax matters, to a rule of conduct or law, enacted directly by mere numbers of people or assemblages of people within a municipal corporation, and is contrary to Section 1 of the XIV. amendment to the constitution of the United States of America; sections 3 and 4 of Article IV. of the constitution of the United States of America, and also is contrary to the implied provisions of the constitution of the United States that government of the several states shall be representative in form and that the several states shall create and maintain representative legislative assemblies, and that the citizens of the United States shall be protected in their right of enjoyment of life, liberty and property by the law of the land, which is an inherent attribute of citizenship of the United States, which no state or its people may impair.

By reason of the foregoing errors and holdings, the appellant and plaintiff in error, prays that the said judgment and decree may be reversed, and that

a mandate be issued, decreeing that a decree be entered in favor of the appellant and plaintiff in error, and for the costs and disbursements, and that he may be restored to all things which he has lost by reason of said judgment and decree.

BRIEF.

The initiative and referendum amendment, Article IV., Section 1, of the Oregon constitution, adopted June 2, 1902, is invalid as it changes the former Republican form of government of the State of Oregon into a pure Democracy, in violation of Article IV., Section 4, of the constitution of the United States, which guarantees to every state in this Union a Republican form of government.

As the acts plaintiff in error seeks to enjoin are attempted to be done under and by virtue of the powers attempted to be conferred by said initiative and referendum amendment, the validity of said initiative and referendum amendment is the underlying foundation question involved in this case, and should be first presented.

If the foundation falls, the structure falls.

The right of plaintiff in error, a taxpayer, to bring this suit in equity and test the legal power of the city to issue bonds which would be mortgages upon property of plaintiff in error and which he would be taxed to pay, is well established.

Dillon Municipal Corporation (5th Ed.), Sections 1579-1581.

Crampton v. Zabriskie, 101 U. S. 601, 609.
21 Ency. of Law (2d ed.), 45, 76.

The powers of municipal corporations are limited to the powers granted in their charters.

Pac. University v. Johnson, 47 Or. 448.

McDonald v. Lane, 49 Or. 530, 532.

Naylor v. McColloch, 54 Or. 305, 308.

Municipalities cannot issue bonds unless the power to do so is conferred by legislative authority, express or implied, and that any doubt as to the existence of such power ought to be resolved against its existence.

25 Cyc. 1575.

21 Ency. Law (2d ed.), 45, 70.

Bonham v. Bank, 144 U. S. 173.

Klamath Falls v. Sachs, 35 Or. 325.

This suit was commenced and is prosecuted to prevent the issuance of negotiable bonds and there has been no consent by plaintiff in error, no laches, and the question is before the court for decision on its merits, and is not embarrassed by any question of sale of bonds to a bona fide purchaser.

Aylsmore v. Seattle, 48 Wash. 42, 48, 49.

Stern v. Fargo (N. D.), 122 N. W. R. 403,
406.

21 Ency. Law (2d ed.), 45, 70, 76.

The validity of the constitutional amendment must be determined by what can be done under its authority as written.

Hood River Light Co. v. Wasco County, 35 Or. 498, 510, 512.

Ames v. People, 26 Colo. 83-109; s. c. 56 Pac. R. 656, 663.

People v. Johnson, 34 Colo. 143; s. c. 86 Pac. R. 233 on 237.

Collins v. New Hampshire, 171 U. S. 33.

Henderson v. New York, 92 U. S. 268.

Minnesota v. Barber, 136 U. S. 313.

Stuart v. Palmer, 74 N. Y. 188.

Colin v. Lisk, 153 N. Y. 188.

Gilman v. Tucker, 128 N. Y. 190.

Dexter v. Boston, 176 Mass. 247.

As said by Justice Moody in *Howard v. R. R. Co.*, 207 U. S. 463 on 515, and many cases are there cited to uphold the statement:

"A law which can not endure the test of the Constitution without judicial amendment must perish."

Whether the constitutional amendment to state constitution violates the Federal constitution is a judicial question to be considered and decided by the courts.

Kadderly v. Portland, 44 Or. 118, 130, 135 and cases there cited.

Gunn v. Barry, 15 Wallace (U. S.) 610, 629.

The fact that a constitution (Oklahoma) containing similar provisions to Article IV., Section 1, but not similar to Article IV., Section 1-A and Article XI., Section 2, was submitted to Congress, and the state admitted to full rights in the Union under it, cannot make such provisions valid.

Gunn v. Barry, 15 Wallace (U. S.), 610, 629;
s. c. 21 Law Ed. 212 on 215.

In re, Rahrer, 140 U. S. on 560; s. c. 35 Law
Ed. on 576.

Calhoun v. Calhoun, 2 S. C. 301.

Cooley's Cons. Lim. (6th Ed.), 44-45.

Duty of Federal Court to set aside provision in
conflict with Federal constitution.

Cummings v. Missouri, 4 Wall. (U. S.) 277;
s. c. 18 Law Ed. 356 on 362.

It is only when some person attempts to resist the operation of the act and calls in the judicial power to pronounce it void as to him, his property or his right, that the objection of unconstitutionality can be presented and sustained in the courts.

In re Buffalo, 124 N. Y. S. 70.

People v. B. R. Co., 89 N. Y. 75 on 93.

Wellington v. Petitioners, 16 Pick. (Mass.)
87 on 96.

Cooley's Cons. Lim. (6th Ed.), 196, 197.

The framers of the constitution of the United States established Republican form of government by means of electing representatives of the people to carry on the government.

The representative feature, the checks and balances, were the essence of the form of government.

They knew the difference between Democracy and Republic.

It is true these words had been used very loosely and are still used very inaccurately.

The framers of the United States constitution used the words "Republican form of government" to designate the kind of Republican form of government that was established in the Original Thirteen States and which they were drafting for the government of the United States.

Minor v. Happersett, 21 Walace (U. S.) 162, 175, 176.

The constitution of the United States had this Section 4 of Article IV inserted therein to guarantee the perpetuity of the Republican form of government known to and framed by the Original Thirteen States.

As this question is fully presented in the briefs filed in the case of Pacific States Telephone and Telegraph Company against the State of Oregon, October term, 1908, Number 822, which case will be argued and submitted at the same time as this case, we hereby refer to the briefs in said case, Number 822.

We ask the Supreme Court of the United States to notice that the initiative and referendum amendment, Article IV., Section 1, of the constitution of Oregon, and the decisions of the Oregon Supreme Court construing it and upholding its validity (all of which are presented in 1 Lord's Oregon Laws, pages 89-91) and the laws of Oregon, 1907, page 407, to provide mode and manner of carrying amendments into effect, authorize the people of Oregon at an election to exercise directly by mere depositing of secret ballots all the power of the State of Oregon, executive, legislative and judicial.

Notice that the power left to the legislature is merely permissive. The legislative power may be taken away entirely by the electors under said initiative and referendum amendment.

By later constitutional amendments the power of the Legislature has already been materially curtailed, if it can be done.

See Article IV, Section 1-A, and Article IX, Section 2, printed above herein in this brief at pages —.

See the following recall amendment which was proposed by the people by initiative petition and approved by a majority of the votes cast thereon at the general election held June 1, 1908. There were 58,381 votes cast for the amendment and 31,002 votes cast against, and under the provision of law, by a proclamation of the Governor, dated June 23, 1908, the amendment took effect on said date.

Constitution of Oregon, Article II., Section 18, recall:

“Every public officer in Oregon is subject as herein provided to recall by the legal voters of the state or of the electoral district from which he is elected. There may be required twenty-five per cent, but not more, of the number of electors who voted in his district at the preceding election for justice of the Supreme Court to file their petition demanding his recall by the people. They shall set forth in said petition the reasons for said demand. If he shall offer his resignation it shall be accepted and take effect on the day it is offered, and the vacancy shall be filled as may be provided by law. If he shall not resign within five days after the petition is filed, a special election shall be ordered to be held within twenty days in his said electoral district to determine whether the people will recall said officer. On the sample ballot at said election shall be printed in not more than two hundred words the reasons for demanding the recall of said officer, as set forth in the recall petition, and in not more than two hundred words the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of said special election shall be officially declared. Other candidates for the office may be nominated to be voted for at said special election. The candidate who shall receive the highest number of votes shall be deemed elected for the remainder of the term, whether it be the person against whom the recall petition was filed, or another. The recall petition shall be filed with the officer with whom a petition for nomination to

such office should be filed, and the same officer shall order the special election when it is required. No such petition shall be circulated against any officer until he has actually held his office six months, save and except that it may be filed against a senator or representative in the legislative assembly at any time after five days from the beginning of the first session after his election. After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected unless such further petitioners shall first pay into the public treasury which has paid such special election expenses, the whole amount of its expenses for the preceding special election. Such additional legislation as may aid the operation of this section shall be provided by the legislative assembly, including provision for payment by the public treasury of the reasonable special election campaign expenses of such officer. But the words: "The legislative assembly shall provide," or **any similar or equivalent words in the constitution or any amendment thereto, shall not be construed to grant to the legislative assembly any exclusive power of law making nor in any way limit the initiative and referendum powers reserved by the people."**

See the following amendment attempting to put all tax legislation in the hands of the electors directly and removing the protection of the Constitution in all tax matters, which amendment was proposed by initiative petition and passed by an affirmative majority at the election of November 8,

1910, and became effective on proclamation of the Governor December 3, 1910.

Constitution of Oregon, Article IX., Section 1-A.

"No poll or head tax shall be levied or collected in Oregon; no bill regulating taxation or exemption throughout the state shall become a law until approved by the people of the state at a regular general election; none of the restrictions of the Constitution shall apply to measures approved by the people declaring what shall be subject to taxation or exemption and how it shall be taxed or exempted, whether proposed by the legislative assembly or by initiative petition; but the people of the several counties are hereby empowered and authorized to regulate taxation and exemptions within their several counties subject to any general law which may be hereafter enacted."

See the following amendment, attempting to take away from the legislature power to enact, amend or repeal any charter or act of incorporation for any municipality, city or town, and attempting to delegate to the legal voters of every city and town power to enact and amend their municipal charter subject only to the Constitution and criminal laws of the state, and to invest **exclusive** power to license, regulate, control or to suppress or prohibit the sale of intoxicating liquors in each municipality, subject to the provisions of the local option law.

This measure was proposed by initiative petition and passed by an affirmative majority at the election of November 8, 1910, and became effective on proclamation of the Governor December 3, 1910.

Constitution of Oregon, Article XI., Section 2.

"Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon, and the exclusive power to license, regulate, control, or to suppress or prohibit the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the State of Oregon."

See the following amendment attempting to delegate to the electors of counties unlimited power to go into debt to build permanent roads within the county. This amendment was proposed by initiative petition and was passed by an affirmative majority at the election of November 8, 1910, and became effective on proclamation by the Governor December 3, 1910.

Constitution of Oregon, Article XI., Section 10.

"No county shall create any debts or liabilities which shall singly or in aggregate exceed the sum of \$5,000 except to suppress insurrection or repel invasion, or to build permanent roads within the county, but debts for permanent roads shall be incurred only on approval of a majority of those voting on the question."

If the said initiative and referendum amendments are valid the legislature can be abolished and all the legislative functions of the state performed by the electors under the initiative and referendum amendments.

Under this "Oregon system" the electors can call a measure a constitutional amendment, and it is beyond the reach of legislature or courts.

The electors can enact constitutional amendments as easy as they can enact statutes. The only difference in the enactment is naming the act a constitutional amendment instead of a statute.

Notice that the veto power of the Governor has been curtailed by the initiative and referendum amendment, Article IV., Section 1.

State v. Kline, 50 Or. 431.

Kadderly v. Portland, 44 Or. 118.

Oregon v. Pacific States Telephone Co., 53 Or. 164.

If this initiative and referendum amendment is valid, the electors of Oregon can abolish the office of Governor and perform the duties of the Governor directly at the polls by means of secret ballot.

See the judiciary amendment, Article VII., proposed by initiative petition and passed by an affirmative majority at the election of November 8, 1910, and became effective on proclamation of the Governor December 3, 1910.

Constitution of Oregon, Article VII., now reads as follows

Section 1. "The judicial power of the state shall be vested in one Supreme Court and in such other courts as may from time to time be created by law. The judges of the supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, and shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected."

Section 2. "The courts, jurisdiction and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. But the Supreme Court may in its own discretion take original jurisdiction in mandamus (quo warranto and habeas corpus) proceedings."

Section 3. "In actions at law where the value of the controversy shall exceed \$20 the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say that there is no evidence to support the verdict. Until otherwise provided by law, upon appeal of any case to the Supreme Court either party

may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury and any other matter material to the decision of the appeal. If the Supreme Court shall be of the opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed notwithstanding any error committed during the trial, or if in any respect the judgment appealed from should be changed and the Supreme Court shall be of the opinion that it can determine what judgment should have been entered in the court below it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court: Provided, that nothing in this section shall be construed to authorize the Supreme Court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower court."

Section 4. "The terms of the Supreme Court shall be appointed by law; but there shall be one term at the seat of the government annually. At the close of each term the judges shall file with the secretary of state concise written statements of the decisions made at that term."

Section 5. "In civil cases three-fourths of the jury may render a verdict. The legislative assembly shall so provide that the most competent of the

permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But provision may be made by law for drawing and summoning the grand jurors from the regular jury list at any time, separate from the panel of petit jurors, and for the sitting of the grand jury during vacation as well as session of the court, as the judge may direct. No person shall be charged in any Circuit Court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state except upon indictment found by a grand jury: Provided, however, that any district attorney may file an amended indictment whenever an indictment has by a ruling of the court been held to be defective in form."

Section 6. "Public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law."

Section 7. "Every judge of the Supreme Court before entering upon the duties of his office shall take and subscribe and transmit to the secretary of state the following oath:

'I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of Oregon, and that I will faithfully and impartially discharge the duties of a judge of the Supreme

Court of this state according to the best of my ability, and that I will not accept any other office except judicial offices during the term for which I have been elected.'"

It would be but a short step further for the electors to abolish the state courts and try lawsuits by secret ballot under the initiative and referendum amendment. The same statutory proceeding of filing statements for complaint and answer and having a ballot title to be voted for and a hearing by buying space in the state pamphlet could be used.

Laws of Oregon, 1907, page 398.

If the initiative and referendum and recall can limit the powers of the legislature and Governor and confer said powers upon the electors directly, then the same power can limit the courts and confer judicial power upon the electors directly.

"Let the people rule directly."

Notice the way the initiative and referendum power has encroached upon the other powers in the state government since 1903.

In *Kadderly v. Portland*, 44 Or. 118, the legislature of the state enacted and amended a charter for the City of Portland in the way such charter had always been enacted by the legislature of the state, and the power of the state and the power of the legislature of the state to pass such municipal charters has always been sustained by federal and state courts.

Winters v. George, 21 Or. on 259.

Attorney General ex rel. Kies v. Lowrey, 199
U. S. 233 on 240.

Plaintiff in the Kadderly case attempted to invoke a limitation upon the ancient power of the legislature of the State of Oregon under the republican form of government, in enacting municipal charters by means of and by reason of the initiative and referendum amendment of 1902.

The Supreme Court of Oregon held that the legislature of Oregon still had the old original power under the republican form of government to enact municipal charters and other laws, and that this power of the legislature was not taken away by the initiative and referendum amendment to the Constitution of Oregon of 1902.

The Supreme Court of Oregon held that the legislature of Oregon could amend or repeal laws enacted by the people of the State of Oregon under the initiative and referendum amendment of 1902, and that the representative features of the republican form of government remained, and that the effect of the initiative and referendum amendment of 1902 was only to retain in the mass of electors a larger share of legislative power than heretofore.

The Supreme Court of Oregon held in the Kadderly case that statutes enacted by the people are subject to the same constitutional limitations as legislative statutes, and after their adoption they exist at the **will of the legislature** just as do other laws.

Therefore the Supreme Court of Oregon held in the Kadderly case that the original initiative and referendum amendments of 1902 to the Constitution of Oregon did not violate the Federal Constitution and its guaranty of a republican form of government to the states.

Kadderly v. Portland, 44 Or. 144, 145, 146.

The Kadderly case, 44 Or. 144, expressly holds that Article IV., Section 4 of the United States Constitution prevents the people of the state from abolishing a republican form of government.

At page 145 it defines a republican form of government as follows: "A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority."

The Supreme Court says of the original initiative and referendum amendment:

"Now, the initiative and referendum amendment does not abolish or destroy the republican form of government or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of government or substituted another in its place. The government is still divided into the legislative, executive and judicial departments, the duties of which are discharged by representatives elected by the people. Under this amendment it is true the people may exercise a legislative power, and may in

effect veto or defeat the bills passed and approved by the legislature and the governor; but the executive and legislative departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes and may be amended or repealed by the legislature at will."

The power of the electors to encroach upon the departments of the state government by means of the initiative was upheld by the Supreme Court of Oregon in the following cases:

Acme Dairy Co. v. Astoria, 49 Or. 520, 523, 524, 525.

McKenna v. City of Portland, 52 Or. 582, 587, 588.

Farrell v. Port of Portland, 52 Or. 582, 587, 588.

City of Eugene v. W. V. Co., 52 Or. 490 on 494.

Lang v. Portland, 53 Or. 92 on 96.

City of Portland v. Nottingham (Oregon), 113 Pac. R. 28 on 30.

State ex rel. v. Swigert (Or.), 116 Pac. R. 440, 441, 442.

In the case of *Kiernan v. Portland*, 112 Pacific R. 402, the Supreme Court of Oregon holds that the state has full power to adopt the direct democratic form of government and that democracy and repub-

lie are synonyms; it attempts to harmonize the differences between Hamilton and Madison on one side and Jefferson on the other; it shows that the unstable republics of Central America all would comply with the guarantee of the federal constitution of a republican form of government, and can be the form of government of states in this Union. Plaintiff in error respectfully urges that the Supreme Court of Oregon is in error in upholding the revolutionary initiative and referendum amendment of Oregon.

That Oregon is now a pure democracy is clear.

Life, liberty and property are protected in Oregon by the good sense of the electors as expressed directly at an election, and in no other way.

The checks and balances of the republican form of government for the protection of the individual and minority are abolished in Oregon.

We respectfully submit that the framers of the United States Constitution provided for an indestructible union of indestructible republican states.

Texas v. White, 7 Wall. (U. S.) 730.

The "Oregon system" is an attempt of an individual state to change its republican form of government into a pure democracy without the amendment of the United States Constitution permitting that to be done.

These questions are somewhat similar to states rights, secession and reconstruction, which have all

been settled in these United States in favor of the permanency of the union and the subordination of the states.

In Oregon the **people** reserve to themselves power to propose **laws** and **amendments** to the **Constitution**, and to **enact** and **reject** the same at the polls, **independent** of the legislative assembly; and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly except emergency measures.

A self-executing constitutional amendment.

In Oregon anyone can draft a proposed **law** or **constitutional amendment**, employ circulators to get the necessary names to the initiative petition, file the same with the secretary of state four months before an election, and at the election it is voted upon by ballot title only, without opportunity for amendment of the proposed act or constitutional amendment.

Laws of Oregon, 1907, page 398.

It may escape being discussed or examined in the short time before the election. All that is contained in the proposed **constitutional amendment** or **law** is legally enacted if the title on the ballot is voted for by more voters than the voters who take the pains to vote against the ballot title.

All the voters who fail to vote upon the proposition are presumed to be in favor of the proposed changes.

Thus the most sweeping constitutional changes may be made in Oregon by a small minority of the voters voting for an attractive, catchy ballot title.

All presumptions are in favor of proposed changes in our laws and Constitution under the initiative and referendum.

All the safeguards of representative constitutional government are removed in Oregon in actual practice.

It is as easy to make a constitutional amendment under the initiative in Oregon as a law.

When Oregon was admitted to the Union it had framed a republican form of government similar to those in existence in the Thirteen Original States, and in all the states afterwards admitted into the Union up to and including the admission of Oregon in 1859.

Oregon used to have a written Constitution with three co-ordinate departments—legislative, executive and judicial.

It was a representative republic as established in these United States.

Under these initiative and referendum amendments Oregon is a pure democracy.

Anyone can propose and have voted upon any kind of a constitutional amendment or law.

There is no limit except the fancy of the author of the measure.

The duty is upon the voters at the polls to know how to legislate upon the most complicated constitutional amendments and laws by voting "Yes" or "No" upon a ballot title.

We urge upon the court the revolutionary powers attempted to be conferred by the Oregon initiative and referendum.

It is to be distinguished from what is sometimes termed the initiative and referendum, but which is in reality only the right to petition the legislature.

The South Dakota initiative and referendum, for instance, is only the right to petition the legislature, and is not revolutionary at all.

It does not conflict with the United States Constitution.

The revolutionary initiative and referendum of Oregon does.

The framers of the Constitution of the United States knew the difference between a pure democracy and a republic. By democracy they meant a government in which the people legislate and govern in their own persons directly. By a republic they meant a government in which people legislate and govern through elected representatives. The framers of the Federal Constitution knew that it was necessary to provide a written constitution and an independent judiciary to protect the individual and the minority from the hasty tyrannical actions of the government itself. That is the crowning glory of our form of government. The framers of the Constitution of the United States were familiar with the dangers and failures made by governments operated as pure democracies. They provided against these dangers by creating representative republics with checks and balances under written constitutions.

The framers of the Constitution of the United States did not think they were authorizing a form of government, either federal or state, where the protection of life, liberty and property of the individual and minority depended on the good common sense of the majority of the voters as registered at an election. Yet Oregon has attempted to adopt that system. The Oregon legislative branch of the government has usurped the power of government from the other co-ordinate branches. This enlarged legislative function of government is now exercised directly by the voters participating in an election at the polls.

We have the recall in the hands of the voters, so that all officers, including judges, governors and legislators, must conduct their offices in accordance with the ideas of the majority of the voters at each election or the offices can be taken away from them by the majority of the voters under the recall. Thus the initiative and referendum and recall as we have it in Oregon have absolutely wiped out the protection of the minority and the individual, and changed our republican form of government, which was the distinctive feature of our representative republican form of government under our written Constitution as framed by the fathers of our country. The courage of the officials is destroyed by this system. Oregon under the initiative and referendum and recall has a system in which it is hard to get the courts to decide a case against the vote

of the plurality of the people supported by clamor among politicians and newspapers for a given decision.

Such a method of enacting law is not due process of law.

Loan Association v. Topeka, 20 Wallace (U. S.) 655.

Holden v. Hardy, 169 U. S. on 389.

We are to construe the Constitution as it was construed at the time it was adopted. Its terms mean now what the terms meant at the time of its adoption.

Minor v. Happersett, 21 Wallace (U. S.) 162, 175, 176.

Dred Scott v. Sanford, 19 How. (U. S.) 392, 426.

Acme Dairy Co. v. Astoria, 49 Or. on 523.

Gibbons v. Ogden, 9 Wheaton (U. S.) 1, 188.

State v. Wrighton (N. J.), 22 L. R. A. 548, 559, 560.

2 Watson on the Constitution, page 1289.

The meaning of the word "republican" in the Federal Constitution is shown by the case of Minor v. Happersett, 21 Wallace, to be the kind of republican government in existence in America in the states at the time of the adoption of the Federal Constitution.

That the framers of the Constitution drew a distinction between the republican form of government and the democracy is clearly summarized in the special introduction to the "Federalist," by Goldwin Smith, as follows: "They distinguish between a democracy and a republic. By democracy they mean a polity in which the people legislate and govern in their own persons, as they did at Athens, Rome and Florence. By a republic they mean a polity in which the people legislate and govern through their elected representatives. It is, however, pretty clear that one of them at least desired and expected their republic not to be democratic in the common sense of the term, but to be the rule of those who were fit to rule—the landholders, merchants, lawyers and other men of the upper and highly educated class."

Also in number 38 of the "Federalist," written by Madison, entitled "The Plan of the Convention, Republican in Principle."

See the articles in the American Law Review for May and June, 1910, volume XLIV., number 3, pages 341 to 373, by Oliver H. Deane. Page 369: "The members of the convention were familiar with Montesquies' Spirit of Law." Page 362: "The members have made careful analysis of the constitution and history of republics, democracies, confederacies and leagues of ancient and modern history. We find in the records of the convention and in the state conventions frequent reference to the Amphyctionic Council, Achean League, Lycian

League, Roman Republic, Hanseatic League, German Confederation, Swiss Republic. But after all they were compelled to confess that history and human experience thus far had furnished them but little to guide them in the great work they had in hand." Page 363: "The history of every democracy was that its career was tempestuous and short-lived and its death violent. The republics of ancient history were small in population and in territory. They had been city-states." Page 366: "By them it was carefully sought to protect the people from 'the tyranny of their own passions, so that in America at least liberty would never suffer from the indelible reproach of decreeing to the same citizen the hemlock on one day and statues on the next."

"All history had proven that no tyranny had been more despotic or dangerous or difficult to overcome than the tyranny of an unchecked, unthinking and infuriated majority. And this the members of that convention well understood."

We ask consideration of Horatio Seymour's article in the North American Review of 1878, entitled "Government of the United States," especially on page 363, where he says: "It is a remarkable fact that ours is the only system which declares that the majority shall not govern in many vital respects; that it has devised a plan by which it can be held in check, and that each individual has defenses against the will of the body of the people and the power of a government which represents them. The distinctive features of American con-

stitutions are not that they aim to give power to majorities, but that they aim to protect the rights of minorities, and this is done by amendments which are in strong contrast with anything attempted elsewhere."

On page 363: "But our fathers did not stop with declarations. They fortified the rights of states and persons by placing the judiciary for this purpose above the executive and the law-making powers. This is the great distinguishing feature of our government. In this we stand alone among the peoples of the earth."

We ask the Supreme Court to read the article of Mr. D. C. Lewis, published in volume 72, Central Law Journal, page 169, of March 10, 1911; also the note published in the said Central Law Journal following its publication of the opinion of Oregon court in the case of Kiernan v. Portland, which is published in volume 72, Central Law Journal, page 362; note, page 366.

Also the article by Glenway Maxon, published in volume 72, Central Law Journal, page 378, and authorities there cited.

Ex parte Farnsworth, 135 S. W. R. 537.

Rice v. Foster, 4 Harr. (Del.) 479.

We thus urge that the decisions of the Supreme Court of Oregon upholding the power of Oregon to change its form of government into a pure democracy are erroneous and should be reversed. If Ore-

gon can adopt the form of a pure democracy so can any of the other states.

Thus we can have a varied assortment of state governments instead of republican forms of government.

If the State of Oregon can adopt the initiative and referendum amendment, Article IV., Section 1, attempted to be adopted June 2, 1902, can the electors of the State of Oregon under the initiative adopt the further initiative and referendum amendments to the Oregon Constitution, Article IV., Section 1-A, and Article XI., Section 2, attempted to be adopted June 4, 1906, by which the electors undertook to take away the power of the legislature and people of the state over municipalities and delegate it to the electors of each municipality?

We ask the special attention of the Supreme Court of the United States to the sweeping, broad language used and the great grant of power in said constitutional amendments, Article IV., Section 1-A, and Article XI., Section 2, published above in this brief, pages —. By these amendments "the initiative and referendum powers reserved to the people by the Constitution are hereby further reserved to the legal voters of every municipality and district as to all local, special and municipal legislation of every character in or for their respective municipalities and districts." Also "the legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their

municipal charter subject to the Constitution and criminal laws of the State of Oregon."

Cities, municipalities, towns and districts constitute the greater part of a state.

These constitutional amendments change the State of Oregon into a weak confederacy composed of powerful independent cities, municipalities, towns and districts. All the powers, past, present and future, of each of these independent cities, municipalities, towns and districts are to be exercised directly and independently by the legal voters of each.

What the powers of each city, municipality, town and district shall be can be determined independently and separately by the voters of each city, municipality, town and district, subject only to the Constitution and criminal laws of the State of Oregon.

The power of the State of Oregon to create and control municipalities as its governmental subordinate agents is destroyed by these amendments.

The State of Oregon has undertaken to delegate the most important part of its power and sovereignty to the electors of each city, town, municipality and district.

By these amendments the State of Oregon would commit state suicide.

By these amendments the cities, towns, municipalities and districts become states within the State of Oregon, in violation of Sections 3 and 4 of Article IV. of the United States Constitution, as is shown by the following cases from Colorado, which

construe the only other constitutional amendment attempting to deny the legislature power over municipal corporations:

Peo. v. Johnson, 34 Colo. 143, 151, 152, 153, 156, 157.

Peo. v. Sours, 31 Colo. 369.

Williams v. Peo., 38 Colo. 497, 502, 503, 504, 509.

To turn the sovereign power of the State of Oregon over to the electors of a municipality is to destroy absolutely the principles of representation and of a republican form of government, and organize a pure democracy within the limits of a municipality and confer upon that municipal democracy the sovereign powers of the State of Oregon, which is nothing less than allowing the affairs of the state to be run by an oligarchy consisting of the citizens of a municipality which are a mere handful of the people of the entire state.

The despotism of a majority of the voters of a municipality to participate in a municipal election, and who are in fact a minority of the qualified electors of a municipality, makes the most insufferable kind of a municipal despotism.

When that insufferable municipal despotism is given the power of the entire State of Oregon it becomes revolutionary, unbearable, absolutely the end of the state.

Martin's Executors v. Martin, 20 N. J. Eq. 421, 423.

Ex Parte Anderson, 134 Cal. 73.

S. C. 66 Pac. Rep. 194, 195, 196.

Ex Parte Farnsworth, 135 S. W. R. 537.

People v. Humphrey, 23 Mich. 471, 481, 482.

Rice v. Foster, 4 Harr. (Del.) 479.

Peo. v. Sours, 31 Colo. 369, 385, 386.

Peo. v. Johnson, 34 Colo. 143, 148, 156-163.

Plaintiff in error contends that no binding rule of conduct can be created, no law can be made, no tax can be levied except in accordance with the settled forms of our republican government.

Due process of law means not only that there shall be a procedure sanctioned by the well established principles of right and justice, but it must be a procedure prescribed by law.

The edicts of the electors of a municipality expressed at an election cannot be the basis of due process of law, the basis for taxing a man's property, the basis for the exercise of state power, however fair the steps prescribed for holding the election of a municipality may be.

Laws must emanate from the law-making power, and in a constitutional republic that power can only be a representative legislature.

Plaintiff in error insists that these acts complained against are void under the implied powers of the Constitution, and that acts are frequently declared invalid in violation of the implied powers of the Constitution.

See Tiedeman's unwritten Consti. of U. S.,
page 43.

Holden v. Hardy, 169 U. S. 389.

Loan Ass'n. v. Topeka, 20 Wallace 655, where the Supreme Court of the United States says that the government which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, was after all but a despotism. It would be a despotism of the many, of the majority, but none the less a despotism.

It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security which is essential to that happiness, under the unlimited dominion of others.

The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere.

The courts of this country exercise the power of declaring unconstitutional acts which are done in violation of constitutional limitations.

Plaintiff in error asks for the exercise of that power in this case to protect the individual.

Plaintiff in error, as a citizen, is entitled to the exercise of the power of the courts for his protection.

Parker v. Commonwealth, 6 Barr. 507.

Maynard v. Board of Commissioners, 84 Mich. 228, 239.

Downes v. Bidwell, 182 U. S. 244, 281, 283, 285, 290, 291.

People v. Humphrey, 23 Mich. 471.

U. S. v. Cruikshank, 92 U. S. 542.

Ex Parte Anderson, 134 Cal. 73.

Can the people of the state first take the said power away from the legislative assembly and then delegate the said power to the legal voters of every city and town in the state?

Plaintiff in error respectfully insists that that is an illegal attempt to delegate the sovereign power of the legislative assembly to the legal voters of every city and town, and tends to destroy the republican form of government of the State of Oregon and change the republican form of government of the State of Oregon into a mere confederacy of the sovereign cities and towns of Oregon, and that such a revolutionary change cannot be enacted by the voters of the state, but it would require at least the concurrent action of the voters of the State of Oregon and the Congress and the President of the United States of America to bring about such a revolutionary change.

People v. Johnson, 34 Colo. 143, 148, 156-163; s. c. 86 Pac. Rep. 233.

Ex Parte Farnsworth, 135 S. W. R. 537.

In the case at bar there is an attempt to materially curtail the power of the legislature and transfer the power to the electors of cities.

Can it be done under the Constitution?

This case is as different from the Kadderly case (44 Or. 118) as black is from white, as the North Pole is from the South Pole.

To demonstrate that there is no such attempt in the Constitution of any other state to take away from the legislature its constitutional power and illegally delegate it to the electors of municipalities, except the provision held invalid in Colorado, we respectfully urge upon the Supreme Court the careful reading of the case of *State v. Scales*, Okla. 97, Pac. R. 587, where the limitations upon this power are stated, and where the constitutional provisions of other states in this respect are stated.

Also plaintiff in error asks a careful reading of the case of the

City of St. Louis v. W. U. T. Co., 149 U. S. 465-472,

and a careful reading of the constitutional provisions of the State of Missouri in this respect, and the decisions from Missouri, which will demonstrate that the charter of St. Louis, framed under the provisions of the Constitution of Missouri, which allow 13 freeholders to prepare a charter, etc., and submit it to the voters, etc., and which requires said charter to be in harmony with, and subject to, the Constitution and laws of Missouri, and gives to the

General Assembly of Missouri the same power over the charter of St. Louis as over the charter of other cities, does not contain anything which would sustain the constitutional amendment of Oregon, which undertakes to deprive the legislature of its sovereign power over the charters of municipalities in Oregon, and to illegally delegate that sovereign power, belonging to the legislature, to the electors of every city and town.

Plaintiff in error especially urges the Supreme Court to notice that under the charter of St. Louis and the Constitution of Missouri the legality of the power questioned in this case at bar was not raised, and could not be raised because it did not exist in Missouri cases.

Let plaintiff in error emphasize that in Missouri there is no attempt to deprive the sovereign legislative law-making power of its power over the charter of St. Louis and vest it in the electors of St. Louis.

Plaintiff in error respectfully urges that when a question is not involved in a case, cannot be involved in a case, and is not discussed or decided in a case, the case cannot be an authority upon a subject not involved, nor raised, nor discussed.

Plaintiff in error respectfully urges upon the Supreme Court a careful reading of the case of *Ex Parte Pfahler*, 11 L. R. A., N. S. 1092 on 1098, which demonstrates that in California the **legislature** must approve by resolution a city charter, and there is no prohibition upon the sovereign power of the legislature of California nor illegal delegation of power to electors of cities.

See *People v. Johnson*, 34 Colo. 143, 148, 156-163; s. c. 86 Pac. Rep. 233.

Plaintiff in error respectfully urges upon the court a careful reading of the opinion of the Supreme Court of Oklahoma, *Ex parte Wagner*, 95 Pac. 435, which will clearly demonstrate the power of the legislature of Oklahoma over these municipalities.

In the case of

Minor v. Happersett, 21 Wallace 162, 175, 176; s. c. 22 Law. Ed. 627, 630, 631.

the Supreme Court of the United States holds as follows:

"The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

"The guaranty necessarily implies a duty on the part of the states themselves to provide such a government. All the states had government when the Constitution was adopted. In all, the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it

is, therefore, to be presumed that they were such as it were the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the Constitution."

Applying the rule of *Minor v. Happersett* it is proper to inquire whether there was ever, at the time of the adoption of the Federal Constitution, **any prohibition** upon the **legislative power** of the colonies to enact, amend or repeal the charters of any municipality, city or town, and were ever the voters of any city or town in the colonies ever granted the power to enact and amend their municipal charter independent of the legislative power?

A study of the history of municipalities will absolutely demonstrate that what we have in Oregon was utterly unknown in the history of these United States prior to its adoption in Oregon, and attempted adoption in Colorado.

For a correct, interesting and conclusive showing in this regard I respectfully refer the Supreme Court to

I Dillon's Municipal Corporations (5th ed.),
Sections 15 to 63 inclusive, and the authorities cited in the notes thereto.

No such power was vested in the New England towns as is claimed in Oregon.

I Dillon's Municipal Corporations (5th ed.),
Section 42.

In said citations the court will find an historical statement of city charters and the power of the legislature over them.

This **power of the legislature** over municipalities before the adoption of these constitutional amendments has been conclusively established in the State of Oregon.

Winters v. George, 21 Or. 251 on 257.

Simon v. Northrup, 27 Or. 487, 495, 496, 497.

Brand v. Multnomah County, 38 Or. 79-91.

The constitutional questions involved in this case might well be stated to be whether the people of the State of Oregon can take away this **legislative power from the Legislature** of the State of Oregon, and **delegate it to the electors of municipalities?**

A municipal corporation can have no other source than sovereign power, and nothing less than sovereign power can confer the supreme faculties upon any creature.

28 Cyc. 132, 133, 135, 136, 235, 236, 241, 242, 243.

State v. Scales, 97 Pac. Rep. 587.

Elliott v. State, 121 Mich. 611.

State v. Haines, 35 Or. 379, 381.

1 Dillon, Mun. Corp. (5th ed.), Section 63.

That the power of the state cannot be invaded by an amendment to the charter of cities by electors of cities.

Cook v. Dendginger, 38 La. Ann. 261, 263.

Nelson v. Homer, 48 La. Ann. 258.

State v. M. T. Co., 189 Mo. 83 to 107.

Fragley v. Phelan, 126 Cal. 383, 386, 387, 389, 395, 396.

State v. Scales, 97 Pac. Rep. 587.

Straw v. Harris, 103 Pac. Rep. 777.

McMinnville v. Huvenstine, 109 Pac. Rep. 81.

Elliott v. City, 121 Mich. 611.

The case of *Kansas City v. The Marsh Oil Co.*, 141 Mo., 458, 461, 465, 467, 469, may be called to the attention of the court by the defendants, and, if so, we would like to call the court's attention to the fact that said decision is based upon the *State v. Field*, 99 Mo. 352, and on page 355 the court says:

"And the charter adopted is subject to legislative control. The proposition made for relator that when any such city has adopted a charter it is out of and beyond all legislative influence, can not be sustained. We held to the contrary in the case of *Ewing v. Hoblitzelle*, 85 Mo. 64 on 76, 77. Subject to this superior power of the Legislature, the Constitution accords to any city having the requisite population the right to frame and adopt a charter for its own government which will supply its peculiar wants."

Ewing v. Hoblitzelle, 85 Mo. 64, 76, 77, holds that, even in Missouri, there can be no imperium in imperio in a municipal corporation.

See also: *Fawcett v. Fitzgerald*, 14 Wash. 604, for limitations on the power of the voters in amending their charter.

Also in re:

Cloherly, 2 Wash. 137.

City v. State, 4 Wash. 64.

Tacoma v. City, 14 Wash. 288.

Haset v. Seattle, 51 Wash. 174, 178, 179.

Peo. v. Johnson, 34 Colo. 143, 148, 156-163.

Peo. v. Sours, 31 Colo. 369.

Peo. v. Williams, 38 Colo. 497, on 502, 504.

Ex parte Farnsworth, 135 S. W. R. 537.

Rice v. Foster, 4 Harr (Del.) 479.

1 Dillon Mun. Corp. (5th Ed.), Section 63.

Defendants will argue that all the former legislative power of the Legislature of the State of Oregon has been delegated to the electors of each municipality of the state, and the electors of each municipality act as the legislative agents of the State of Oregon in amending their municipal Charters.

Plaintiff in error insists that it is not possible for the people of the State of Oregon to give this destructive and contradictory power to the electors of each municipality in the state.

Peo. v. Sours, 31 Colo. 360 in 385, 386.

Peo. v. Johnson, 34 Colo. 143.

1 Dillon Mun. Corp. (5th Ed.), Section 63.

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The state can not delegate its power without limitation as is attempted to be done in these constitutional amendments, and cities can not exercise state powers.

Straw v. Harris (Or.) 103 Pac. 777.

1 Dillon Mun. Corp. (5th Ed.), Section 33, 63.

Elliott v. City, 121 Mich. 611, on 614.

“The Legislature has power to delegate certain legislative functions to the legislative branch of a municipal government, and the Legislature might empower the common council of the City of Detroit to make by-laws or ordinances in the nature of legislative enactments, but in delegating this authority it **must point out specifically the powers delegated, and the extent of these powers.** The act under consideration goes further than this, and practically abandons all legislative functions on the question of amending or repealing city Charters, and it transfers that authority or delegates that authority to the mayor, etc.”

The Supreme Court of Oregon in the opinion on rehearing (Kiernan v. Portland, 112 Pac. R. 402, on 403) attempted to so construe these constitutional amendments as to retain full power in the electors of the state under the initiative to control the charters of municipalities by either special or general act, and so as to retain full power in the Legislature by general laws to control the charters of municipalities, or to so construe the amendments that they only prohibit action by the Legislature

by means of special acts, leaving the Legislature full power by means of general laws.

By this construction the Supreme Court of Oregon attempts to remove the basis of our contention.

We submit such holding is an erroneous construction of the amendments. We submit that the United States Supreme Court on this writ of error will determine for itself what is the proper construction of the amendments to the Oregon Constitution.

In *Scott v. McNeal*, 154 U. S. 32, on 44 to 48, the court says:

“Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court’s construction of a statute of the territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case this court must decide for itself the true construction of the statute.

Huntington v. Attrill, 146 U. S. 657, 683, 684 (36:1123, 1133).

Mobile & O. R. Co. v. Tennessee, ante, p. 793.

* * * *

“The local law on the subject contained in the Code of 1881 of the territory of Washington, in force at the time of the proceedings now in question, and since continued in force Article 27, Section 2, of the Constitution of the state, does not appear to us to warrant the conclusion that the Probate Court is authorized to conclusively decide as against a living person that he is dead, and his estate therefore subject to be administered and disposed of by the Probate Court.

“On the contrary, that law in its very terms appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise of the Probate Court of jurisdiction to grant letters testamentary or of administration upon his estate, or license anyone to sell his lands for the payment of his debts.”

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 580, 581.

West Chicago St. R. R. Co. v. Chicago, 201 U. S. 506.

V. R. Co. v. South Bend, 207 U. S. 359.

M. J. & K. City R. R. Co. v. Mississippi, 210 U. S. 187.

Chapman v. Crane, 123 U. S. 540, 549.

Newport Light Co. v. Newport, 151 U. S. 527, 537.

Atty. General ex rel Kies v. Lowrey, 199 U. S. 233, on 239.

These amendments are to be construed as written and passed by the people.

Hood River Lumber Co. v. Wasco County, 35 Or. 498, 507-512.

Ames v. Peo., 26 Colo. 83-109.

Peo. v. Johnson, 34 Colo. 143-146.

Howard v. R. R. Co., 207 U. S. 463, 499, 515.

It is not proper for the courts to write into the constitutional amendment, Article XI, Section 2, the limitation that is written into said constitutional amendment by the Supreme Court of Oregon, in the opinion written by Justice McBride, pages 5 and 6, to-wit: "We take it, therefore, that **within the limit of the municipality**, and for those purposes which are purely **municipal**, the City of Portland may include in this charter by amendment any provision or right that the Legislature might have granted before the Constitution was so amended. This being so, there is fair ground for the contention that the city may by amendment to its charter, obtain the right to locate a public bridge over the Willamette river, at any point where such river is **exclusively within the municipal boundaries**, which is the case here."

We earnestly argue to the court that in the constitutional amendment, Article XI, Section 2, there are **no such limitations** upon the power of the electors of the city in amending their municipal charter.

The constitutionality of the amendments and of Section 118½ of the charter are to be determined by considering not only what is attempted to be done

in the case at bar, but also by considering what might be attempted under the **terms** of the amendments as written.

Hood River Lumber Co. v. Wasco County, 35 Or. 498, 507, 508, 509-512.

We ask by what right, by what authority, does the Supreme Court of Oregon limit the sovereign power of the sovereign people of the City of Portland in exercising the sovereign right of amending their charter?

The people of the State of Oregon have endeavored by Section 2 of Article XI of the Constitution of the State of Oregon, to provide as follows: "Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

Plaintiff in error strenuously urges that the Supreme Court of Oregon has no right to read out of that constitutional power any of the authority conveyed, or read in any limitations of power.

The constitutional amendment must stand or fall as adopted by the sovereign people.

Hood River L. Co. v. Wasco County, 35 Or. on 508, where the Supreme Court of Oregon adopts

and approves: "The courts have no right to supply the omission by interpolating provisions, for it is their duty to give effect to the statutes as they are written, and they can not amend imperfect enactments."

To hold otherwise, is for the Supreme Court of Oregon to say in effect, that it can write and adopt constitutional amendments for Oregon, independent of the action of the people, and enact constitutional amendments for the people of Oregon.

We respectfully submit that the Supreme Court of Oregon has no such constitutional power.

This constitutional amendment, Section 2 of Article XI, undertakes to give the same power to every municipality, city or town in the State of Oregon. By what right has the Supreme Court of Oregon limited the powers of the electors of the City of Portland to amend their charter, and deprive the electors of the City of Portland of the power given them by the constitutional amendment, and at the same time allow the City of McMinnville to amend its charter, and give itself powers beyond the limits of the municipality?

See the case of McMinnville v. Hovenstein, 109 Pac. Rep. pp. 81-83-84.

Or does the Supreme Court only limit the power of the electors of the City of Portland to amend their charter, to granting franchises across the Willamette river, within the boundaries of the municipality, and leave St. Johns, for instance, or

Linnton, the power to amend their charters and grant themselves a franchise for a bridge across the Willamette river beyond the boundaries of the municipality?

The power of the Legislature of the State to require bridges to be built by a municipality beyond its boundaries is well settled from the beginning of time.

Washer v. Bullett County, 110 U. S. 558, 562, 564-566.

State v. Williams, 68 Conn. 131 on 150.

Dillon's Municipal Corporations (3d Ed.), Sec. 729, note 2.

4 Ency. of Law (2d Ed.), page 929, notes 10-11, and page 930, notes 1, 2, 3, 4.

Simon v. Northrup, 27 Or. 487.

Dietrich v. Schremms, 117 Mich. 298, 303.

Plaintiff in error respectfully calls the attention of the Supreme Court to the fact that if the Supreme Court of Oregon writes in these limitations, upon the constitutional amendment, Section 2 of Article XI, of the Constitution of Oregon, then we have this anomolous situation, to-wit: The people, by the constitutional amendment, Section 2 of Article XI, have taken away from the Legislature the power to enact, amend or repeal any charter, or act of incorporation, for any municipality, city or town, and have attempted to impose upon the legal voters of every city and town power to enact and amend their

municipal charters, subject to the Constitution and criminal laws of the State of Oregon, and the Supreme Court of Oregon has undertaken in this decision to limit the power granted by the Constitution to the legal voters of Portland to amend their municipal charter, to the limits of the municipality of Portland, and for the purposes which are purely municipal.

Thus the Supreme Court of Oregon has clearly attempted to illegally amend the Constitution of Oregon and exercise legislative power, and that is in violation of the Constitution of Oregon and the United States of America.

Hood River L. Co. v. Wasco County, 35 Or. 498 on 508.

One of the best ways to show that the construction of these amendments in *Kiernan v. Portland*, 112 Pac. Rep. on 403, by the Supreme Court of Oregon is erroneous and should be construed differently by the United States Supreme Court, is to call attention to the cases where the Supreme Court of Oregon has itself made the opposite and correct construction of the amendments in this particular.

In *Aeme Dairy Co. v. Astoria*, 49 Or. 520 on 524, the Supreme Court of Oregon sets forth the way the Constitution read before the amendments, also the amendment and holds: "It will thus be seen that this change in the organic law deprives the Legislative Assembly of **all authority** to enact, amend or repeal any charter of a city or town, the legal vo-

ters of which reserve to themselves the exercise of **all such power**, except the right of repeal."

In *McKenna v. City of Portland*, 52 Or. 191 on 193, the Supreme Court of Oregon sets forth said constitutional amendments and on page 194 construes them as follows:

"By Article XI, Section 2, **the exclusive right** to enact or amend a city charter is vested in the voters."

In *City of Eugene v. Willamette Valley Co.*, 52 Or. 490 on 494, the Supreme Court of Oregon construes said amendment as follows:

"It will thus be seen that the Legislative Assembly has been deprived of the power specified, which is reserved to, and may be exercised by the legal voters of a city or town. As the Legislature could, heretofore, have changed a municipal charter or altered any part of it, except that vested rights could not be impaired or destroyed, it would seem necessarily to follow that, under the amended clause of the Organic Act quoted, the qualified voters of every town and city possessed the same measure of power."

In *Farrell v. Port of Portland*, 52 Or. 582, the Supreme Court of the State of Oregon was considering a suit brought by a citizen and taxpayer of the Port of Portland, to enjoin and restrain its Board of Commissioners from carrying into effect the provisions of an amendment to the act incorporating the port, proposed by the initiative and adopted by the voters, on the ground that such law is void. The court sets forth the constitutional amendments, construes them (page 587) as follows:

"All these amendments so far as they refer to the same subject matter should be read together and be so interpreted as to carry out the purpose of the people in adopting them, regardless of the technical construction of some of the language used. By the amendment of 1902 the initiative and referendum powers were created and defined, and made applicable to general legislation. By the amendment known as Article IV, Section 1A, these powers were further enlarged and extended to the legal voters of every municipality and district as to all local, special and municipal legislation, and by the amendment of Section 2, Article XI, the Legislature was prohibited from creating corporations by special law, and from enacting, amending or repealing any charter or act of corporation then in existence. The power, therefore, to enact or amend municipal charters no longer resides in the Legislature, but is to be exercised only by the people. And unless the power to amend acts incorporating municipalities other than cities and towns is thus reserved to or vested in the people, they can not be changed, amended or modified until the adoption of some constitutional amendment covering the subject. The court should not reach such a conclusion unless it is compelled to do so by the language of the several amendments, and we can not bring ourselves to believe that such was the intention of the people in adopting these amendments, although a strict construction of the language used in one or more of them might lead to that result. The manifest purpose so far as it concerns the question now

under consideration, was to take from the Legislature and vest in the people the power to amend municipal charters and acts governing and defining the powers and duties of all municipal corporations. This is evident from the provisions of Article IV, Section 1A, reserving this power to legal voters of every municipality and district, as to all local legislation, which provision is applicable to amendments to municipal charters (*Acme Dairy Co. v. Astoria*, 49 Or. 520; 90 Pac. 153), and we think this language must be read in connection with Section 2 of Article XI, and when so interpreted the power sought to be exercised in this case is conferred."

In *Long v. City of Portland*, 53 Or. 92, the Supreme Court of Oregon was considering a general law passed to provide procedure to carry out said constitutional amendments and it was contended in that case that the law was invalid as an amendment of the charter of the City of Portland by general law, and the Supreme Court of Oregon recognized that the argument would be valid if the premise was well taken, but held that as the law was passed merely to make effective the constitutional provision it was not an amendment of the city charter. The opinion in the *Long* case, 53 Or. 92, is a strong decision that the Legislature has no power by general law to amend charters of municipalities.

In *City of Portland v. Nottingham*, 113 Pac. R. 28 on 30, the Supreme Court of Oregon was considering the contention of the City of Portland that a general statute passed by the Legislature in 1907 gave it a right to appeal a reassessment case when

the charter passed in 1903 did not provide for an appeal. The Supreme Court of Oregon then held:

"An appeal is not a matter of primary right. It is a privilege, and he who would enjoy that privilege must show some statute conferring it upon him.

Portland v. Gaston, 38 Or. 533; 63 Pac. 1051.

Sears v. Dunbar, 50 Or. 36; 91 Pac. 145.

Union Nat. Bank v. Barth, 179 Ill. 83; 53 N. E. 615.

"Prior to the enactment of Chapter 162 of the laws of 1907, page 311, there was no appeal from an order granting a new trial of an action at law.

Kearney v. Snodgrass, 12 Or. 311; 7 Pac. 309;

Beekman v. Hamlin, 23 Or. 313; 31 Pac. 707.

"The portion of that chapter relied upon by the appellant here is embodied in Section 547, L. O. L., reading thus: 'A judgment or decree may be reviewed as prescribed in this chapter, and not otherwise. An order affecting a substantial right and which in effect determines the action or suit so as to prevent a judgment or decree therein, or a final order effecting a substantial right and made in a proceeding after judgment or decree, or an order setting aside a judgment and granting a new trial for the purpose of being reviewed, shall be deemed a judgment or decree.

"Does this enactment of the Legislative Assembly of 1907 apply to the proceedings under the char-

ter of the City of Portland under consideration here, so as to allow an appeal from the order of the Circuit Court granting a new trial in that court? Section 2 of Article XI of our state Constitution provides that 'corporations may be formed under general laws, but shall not be created by the Legislative assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of corporation for any municipality, city or town. The legal voters from every city and town are hereby granted power to enact and amend their municipal charter subject to the Constitution and criminal laws of the State of Oregon.'

"This provision of the Constitution was adopted by the people at the June election of 1906, and went into effect upon the proclamation of the Governor June 25th of that year. Its effect is to take from the Legislative Assembly the right to amend the charter of the City of Portland, although enacted by the Legislative Assembly itself in January, 1903. Further, Section 1A of Article IV of the Constitution provides that 'the initiative and referendum powers reserved to the people by the Constitution are hereby reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation of every character, in or for their respective municipalities and districts.' These constitutional provisions confer ample and exclusive power upon the people of every municipal corporation to regulate their own affairs respecting municipal legislation and procedure. The Legislative Assembly

can not pass laws to repeal or amend municipal charters even by implication respecting such matters. On those subjects the charter of the City of Portland is complete within itself and is subject only to the Constitution and criminal laws of the state. That charter does not provide for the appeal of any cause like the one under consideration beyond the Circuit Court of Multnomah County, and hence the appeal should be dismissed.

"In reaching this conclusion we are not unmindful of the doctrine in *Straw v. Harris*, 54 Or. 424; 103 Pac. 777, which holds in effect that the state may not surrender its sovereignty to municipalities to the extent that it must be deemed to have perpetually lost control of them; but no question of state supremacy over its subordinate municipalities is here involved. The matters in dispute relate purely to the city's internal affairs over which it has supreme control by virtue of the constitutional amendments above quoted. The appeal is dismissed."

Thus we have demonstrated that the Supreme Court of Oregon has decided in five different cases before the one under review was decided, and in one case decided since, that the Legislature can not by either general or special law amend or enact or repeal the charter of municipality.

In view of these conflicting decisions by the Supreme Court of Oregon, the Supreme Court of the United States ought to pass upon the correct construction of the constitutional amendments and decide whether they attempt to take away from the Legislature of Oregon the right to enact, amend or repeal the charter of municipalities by general law.

Town of Enfield v. Jordan, 119 U. S. 680.

Norton v. Shelby County, 118 U. S. 425; s. c.
30, Law Ed. 178, 185, 186.

Whether the amendments take away the power of the Legislature to enact, amend or repeal the charters of municipalities is a question of general law upon which the Supreme Court of the United States should pass for itself upon this writ of error.

Foster's Federal Praden (4th Ed.), Sec. 376.

Before the amendment the Constitution of Oregon, Article XI, Section 2, reads as follows:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights."

The section was amended to read as follows:

"Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter, or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

At the same time this other amendment was adopted, and the Supreme Court of Oregon holds it

is also to be read with the other amendment and the two construed together:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts."

It thus appears that under the original Constitution municipal corporations could be authorized only by the Legislature and it could authorize municipal corporations by general law or special law, or both.

The Legislature was supreme in the creating, amending and repealing municipal charters.

Winters v. George, 21 Or. on 259.

Commissioners of Laramie Co. v. Commissioners of Albany Co., 92 U. S. 307.

Atty General ex rel Kies v. Lowrey, 199 U. S. 233 on 240.

It was not the purpose of the people in enacting said constitutional amendments to merely deny the Legislature the power to enact, amend or repeal municipal charters **by special act and leave the Legislature full power in the premises by general act.**

The manifest purpose was to take away from the Legislature the power to enact, amend or repeal the charters of municipalities and delegate the power to the electors of each municipality.

Such is the plain reading of the amendments.

Such has been the decision of the Oregon Supreme Court in every case except only the Kiernan case.

Article XI, Section 2, as amended, leaves the power of the Legislature over corporations, other than municipal corporations, just as it was before the amendment. The only change made by the amendment was as to the power of the Legislature over municipal corporations. The language of the amendment was:

“The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon.”

That is a very plain prohibition of any further power in the Legislature.

We respectfully submit that the amendment mean what the words clearly say and the question of the power of the electors to take away said power from the Legislature and delegate it to the electors of municipalities should be decided to exist, or not to exist, in this case.

The courts should not amend the constitutional amendments by construction.

Hood River Lumber Co. v. Wasco County, 35 Or. 498, 510, 512.

Scott v. McNeal, 154 U. S. 34, 45, 46.

Howard v. R. R. Co., 207 U. S. 463, 499, 515.

The constitutionality of the amendments is to be determined by what can be done under the amendment as written.

Hood River Lumber Co. v. Wasco County, 35 Or. 498.

Peo. v. Johnson, 34 Colo. 143.

"A law which can not endure the test of the Constitution without judicial amendment must perish," said Justice Moody.

207 U. S. on 515, and cases there cited.

If the electors of the State of Oregon have the power to pass these constitutional amendments, that power and those amendments should not be erroneously taken away from them by the courts.

If the electors have attempted to use the power they have not under the Constitution, the courts should so hold.

The amendments authorize no finespun distinctions between general laws or special laws. The amendments, if valid, clearly vest the **exclusive** power over municipalities and districts in the voters of each municipality and district, to the exclusion of both the voters of the state and the Legislature.

This question is squarely presented in this case:

Can this great, unlimited, exclusive power of a sovereign state be delegated to the voters of each municipality by these constitutional amendments?

Plaintiff in error has presented arguments and authority why this should be answered "no."

As defendants are trying to issue bonds upon plaintiff's in error property and tax plaintiff in error under this assumed power, plaintiff in error has the right, and it is his duty to present these constitutional questions to the courts for decision.

4 Dillon Mun. Corp. (5th Ed.), Sections 1579, 1581, and many cases there cited.

Crampton v. Zabriskie, 101 U. S. 601, 609.

Plaintiff in error as a citizen of the United States has a right to the protection of the 14th amendment to the Constitution of the United States against this burden being placed upon him and his property by these state agencies and under the authority of the State of Oregon without due process of law.

This is not a theoretical question with plaintiff in error. These defendants, relying upon the validity of these very amendments, are attempting to encumber the property of plaintiff in error and tax plaintiff in error in very large amounts.

Plaintiff in error has the right to have these questions decided in this suit by the Supreme Court of the United States.

Castillo v. McConnico, 168 U. S. 674, 679-680.

S. L. & T. Co. v. Roberts, 177 U. S. 318, 327, 328.

The Supreme Court of Oregon in this case (112 Pac. 406) held that the people of the State of Oregon had the right to recall this power delegated to

the electors of municipality and that this implied power of recall of the delegated powers would save the amendments from being in violation of the Federal Constitution.

It was also held by the Supreme Court of Oregon in the cases of

City of McMinnville v. Hovenstine, 109 Pac.
Rep., p. 81; and
Straw v. Harris, 54 Or. 424,

That the state might not make a perpetual surrender of state sovereignty to municipalities, but it could make a temporary surrender of state sovereignty to municipalities.

In other words, we understand the Oregon Supreme Court to hold that one municipality might try to exercise the power of the State of Oregon and that no one could question it but the state or United States government.

This overlooks the duty of government to protect the individual.

That seems to plaintiff in error to be an erroneous holding which would introduce chaos into our law. I suppose that means that if a municipality undertakes to invade the state sovereignty of Oregon or undertakes to interfere with another municipality and the officers in control of the state government see fit not to interfere, the municipality may be permitted to do the wrong, but if at any future time there is a change of state officers the lawless municipality can be called to account for undertaking

to impose upon or impair the sovereignty of the State of Oregon, or to take the property of the State of Oregon without the consent of the State of Oregon.

I suppose that means that if one municipality undertakes to impose upon another municipality in Oregon and repeal or change its charter, that the respective municipalities shall be allowed to fight out their differences without interference from the state and without power to appeal to the courts for decision of the question, but that when the civil war between the warring municipalities gets so bitter that there is danger that the President of the United States or Congress will declare martial law in Oregon and send Federal troops out here to restore order, then the Government and Legislature of the State of Oregon can call out the militia and restore order, but that any mild disturbance between municipalities is temporarily lawful.

In other words, I understand that contention to be that if a municipality only undertakes to injure the property and person of an individual or of a minority of citizens that is a mere temporary assumption of sovereign power of the State of Oregon, and is a trifle which the courts will not redress.

It seems to plaintiff in error that the suggestion is revolutionary and erroneous.

Plaintiff in error has understood from the study of the laws of our country and its history that the object of organized government is to protect the life and limb and property of the individual from injury by other individuals and by municipalities and by

the state itself. Plaintiff in error contends that the individual citizen is entitled to protection from illegality.

Plaintiff in error has understood that our government was a government of law, not of favor, not of force, and was created and is maintained to protect the individual.

Plaintiff in error respectfully urges upon the court that it is the law that when a municipal corporation undertakes to raise money for an illegal object by issuing bonds and taxation of its citizens to pay the bonds that it must be done for a lawful purpose, and only for a lawful purpose, and that it is not lawful for a municipality to try and appropriate property or franchises or any property or easements in property which belong to the State of Oregon.

4 Dillon's Mun. Corp. 5th Ed., Sec. 1579, and on.

That it is not lawful for one municipality and its electors to try and repeal a law enacted by the sovereign State of Oregon.

Plaintiff in error is met by the suggestion and the opinion of Justice King, to-wit: "Such grants of sovereignty, however, may be recalled by the power conferring them (*Straw v. Harris*, 54 Or. 424), and this power of recall serves to prevent the abuses of the privileges delegated."

Plaintiff in error urges that such a decision by the courts is merely the court abdicating and relin-

quishing its constitutional power and constitutional duty to protect the individual in his rights. Such a decision destroys the power of the court to protect the individual in his constitutional rights, and abdicates utterly one of the most important powers of the co-ordinate branches of our government. Such a decision leaves the individual only what protection may be offered him by the people of the state in enacting and recalling constitutional amendments. Such a decision absolutely prevents the plaintiff in error from getting any protection from present illegal and unconstitutional exactions by means of appeal to the courts.

Under such a decision the plaintiff in error must suffer unconstitutional exactions until the extent of his suffering and loss has aroused the conscience of the Constitution-making or legislative power of the people of the entire State of Oregon to such an extent that they will repeal or recall the unconstitutional power and exercise of power.

The power of recall in the states does not protect the plaintiff in error in his constitutional rights, because such recall by the people of the state can not undo wrongs already inflicted upon appellant and impair vested rights.

Plaintiff in error can only get protection by the exercise of preventive power of the courts.

For instance, the people of the State of Oregon could not recall these two million dollars of bonds, once they are issued under the decision of the courts that their issuance was lawful and constitutional. Such two million dollars of bonds and interest would

have to be paid by the taxpayer by taxation levied upon property.

The rights of the bond buyers would be protected by the Federal Constitution and Federal courts.

Mead v. Portland, 45 Or. 1, p. 9.

Warren County v. Marey, 97 U. S. 96.

It may be that the people of the state, by constitutional amendment, could require the City of Portland to remove this bridge as an unreasonable obstruction to navigation. But if they did that, the bridge would have to be removed at the expense of taxpayers, one of whom is the plaintiff in error; and plaintiff in error would not only be taxed to pay for the injury to the harbor of the City of Portland, but would be taxed to remedy the injury to the harbor of the City of Portland.

Such a remedy for plaintiff in error may well be compared to the remedy of hanging a man first, trying him afterward, adjudging him innocent, and uttering a prayer to the Almighty for the repose and happiness of his soul in the future.

Plaintiff in error respectfully urges that the law contemplates in our scheme of government that the courts afford a more satisfactory protection for person and property.

Hood R. L. Co. v. Wasco County, 35 Or. 498-512.

It is only when some person attempts to resist the operation of the act and calls in the judicial

power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained in the courts.

In re Board Buffalo, 124 N. Y. S. 70.

Peo. v. B. R. Co., 89 N. Y. 75 on 93.

Wellington v. Petitioner, 16 Pick. 87 on 96.

Cooley Const. Lim. (6th Ed.), 196, 197.

The decision of the Oregon Supreme Court on this point demonstrates that plaintiff in error is being deprived of his property by the State of Oregon without due process of law and plaintiff in error is entitled to protection of the 14th amendment to the Constitution of the United States and of the Supreme Court of the United States.

Plaintiff in error urges that the effect of this decision is to allow the electors of the City of Portland to seize part of the power of the State of Oregon over the Willamette river and that it is illegal for the State of Oregon to permit such power to be taken away or for it to surrender such power.

G. T. & W. Ry. Co. v. City of South Bend, 89 N. E. Rep. 885 on 887-891, Sec. 91 N. E. Rep. 809.

Plaintiff in error also urges that if the voters of Portland are allowed to take the use of the Willamette river by means of taking the right to build this bridge across the river, they are in effect taking part of the title to the river away from the State of Oregon.

The grant of the right to the use of real property is in effect a grant of the title of the property.

Coke Litt., 4b.

Dved. Goldin v. Lakeman, 2 Barn. & Add. 42.

Caldwell v. Fulton, 31 Pa. St. 484.

Clement v. Youngman, 40 Pa. St. 344.

2 Tiffany on the Modern Law of Real Property, 344.

Plaintiff in error respectfully contends that it appears from the decisions of the Supreme Court of Oregon and the plain reading of said constitutional amendments, that the same are in violation of the Federal Constitution and that the decision in this case should be reversed by the Supreme Court of the United States.

Can the electors of the City of Portland legally adopt the pretended Section 118½ of the charter of the City of Portland which is printed above in this Brief, page . . . , by virtue of the above mentioned initiative and referendum amendments to the Oregon Constitution?

By reading the said Section 118½ of charter printed above in this Brief, pages . . . , the court will ascertain that the voters of Portland attempted to enlarge powers of the City of Portland by giving it the power to issue \$2,000,000 of 30-year 4 per cent bonds, power to levy taxes to pay same, power of eminent domain, power to grant franchise across the navigable Willamette river owned by the State

of Oregon, and also to impose a burden upon the County of Multnomah, of operating and maintaining this Broadway Bridge.

Thus the voters of Portland were attempting to exercise state powers of the largest and most important kind in adopting said Section 118½ of the charter of the City of Portland.

The so-called Section 118½ is invalid as it is an attempt to exercise sovereign power of the State of Oregon.

The State of Oregon owns the Willamette River. It is admitted that the Willamette River is a navigable river. It is the settled law of Oregon that the title of the Willamette River is in the State of Oregon.

Ore. v. P. G. E. Co., 52 Ore. 515, 534.

C. M. & M. Co. v. Johnson, 52 Ore. 547.

Montgomery v. Portland, 190 U. S. 89, 105, 106.

Hume v. R. R. P. Co., 51 Or. 237.

Portland v. Montgomery, 38 Or. 215.

Montgomery v. Shaver, 40 Or. 250, 251.

W. B. Co. v. Hatch, 125 U. S. 1, 16, 17.

Shiveley v. Bowlby, 152 U. S. 30, 33.

Union Bridge Co. v. U. S., 204 U. S. 365, 401.

Manigault v. Sprigs, 199 U. S. 473, 478, 480.

Oregon v. Portland Gen. Elec. Co., 52 Or. 502, 530, 531, 533, 534.

Commonwealth v. Ludwick, 151 Mich. 498.

City of St. Louis v. Myers, 113 U. S. 566.

15 Enc. of Law (2d ed.), 357.

Straw v. Harris, 54 Or., 103 Pac. Rep. 777.

Therefore, it clearly appears admitted on these pleadings that the Council and electors of the City of Portland are attempting to tax plaintiff and to put a mortgage upon plaintiff's property, for the purpose of building a bridge across the property of the State of Oregon.

It would be a great injury to plaintiff and other taxpayers for these bonds to be sold when the city has no right or power to build the bridge. Plaintiff has the right to raise that question, and should raise that question now.

21 Ency. Law (2d ed.), 60, 61.

Sherman v. Bellows, 24 Or. 553, 556.

4 Dillon Mun. Corp. (5th ed.), Section 1579-1587.

The State of Oregon is not called upon to interfere until the city actually attempts to invade the property of the State of Oregon.

The utter fallacy of claiming that the voters of the city can exercise a franchise, exercise power over the property of the state, is shown by considering for a moment that, if the City of Portland can take this piece of the state's property without its consent, it can take any other piece that it wants, and so can any other municipality.

For instance, the City of Oregon City and its voters could, for the benefit of the Portland General Electric Company amend the charter of Oregon City so as to grant and take a franchise in the locks and river belonging to the State of Oregon at Oregon City, and completely reverse and nullify the decision of *Oregon v. Portland General Electric Co.*, 52 Or. 502 to 534.

The City of Salem and its electors could appropriate the use of whatever property the state has in that vicinity that the City of Salem and its electors would like to have by merely amending the charter of the City of Salem.

The City of Eugene could appropriate the use of the property of the state at the State University.

The City of Linnton could take a bridge franchise across the river at Linnton below Portland.

The City of St. Johns likewise.

In other words, if the city and its electors can interfere with the rights of the state in one particular—exercise the rights and sovereign power of the state in one particular—they can exercise the sovereign rights of the state in all particulars.

The case of *Straw v. Harris*, Or. 103 Pac. Rep. 777, announces most clearly and distinctly the power in the courts to annul this unconstitutional claim of sovereign power in municipalities and their electors.

Port of Portland Has Granted No Franchises.

The Port of Portland is a municipal corporation invested with the duty to improve the Willamette

River and given jurisdiction over the same by the State of Oregon. The City of Portland has no jurisdiction over the Willamette River.

The amended complaint alleges that the city has no franchise to build this Broadway Bridge from the State of Oregon.

When the plaintiff in error offered in evidence the application of the City of Portland to the Port of Portland, and the action of the Port of Portland therein, the lower court erroneously rejected said evidence as immaterial.

Can the electors of Portland exercise the sovereign powers of the State of Oregon and encroach upon the powers and jurisdiction of the Port of Portland, a corporation created by the Legislature of the State of Oregon?

The plaintiff in error is strenuously urging that this proceeding is illegal, because the state has not granted such franchise to the city, neither by the act of the Legislature of the state, nor by act of the sovereign people of the entire state, nor by act of the Port of Portland, created by the state.

It is alleged in the amended complaint; it is current history that the Port of Portland, the municipal corporation having jurisdiction and control over the Willamette River, not only has not granted a franchise to the City of Portland to build the Broadway Bridge, but that the Port of Portland is opposed to the building of the Broadway bridge, because of the injury it will inflict upon the harbor of the City of Portland.

Until the City of Portland can sell the bonds and get the money, so that the City of Portland can trespass upon the bed of the Willamette river and attempt to construct thereon piers for this bridge, which will obstruct navigation, the State of Oregon, the Port of Portland, and the citizens of the State of Oregon are not called upon to take any steps to keep the City of Portland from trespassing upon the Willamette River; but when the City of Portland attempts to issue bonds which are first mortgages upon the property of plaintiff, to provide money to attempt to make this illegal trespassing upon the property of the State of Oregon, then plaintiff has a right to bring this suit, and it is his duty to bring this suit, and he has brought this suit to enjoin the creation of illegal charges and taxes upon plaintiff's property by the illegal acts of municipal officers. Defendants are very incorrect when they assert that, until the Legislature interferes, the charter amendments are valid.

If the Legislature can object to these charter amendments, because they are beyond the power of the electors of the city to infringe upon the state's sovereignty, then the charter amendment must be invalid, and can be so adjudged in the suit to prevent the defendants, officers of a municipality from placing a tax upon plaintiff's property.

4 Dillon Mun. Corp. (5th Ed.), Sections 1579-1587.

Plaintiff does not contend for one moment that the Legislature could not have authorized the building of this bridge by the City of Portland, could not have granted a franchise to the City of Portland, the same as the Legislature has done for all the other bridges of the City of Portland.

Plaintiff makes this admission, as plaintiff contends the initiative and referendum amendments are void. If they are valid, this would not be correct.

What plaintiff is most strenuously urging is, that until the Legislature of the state, the sovereign state, does authorize and empower the City of Portland to build this bridge across the Willamette River and tax plaintiff, that plaintiff cannot be taxed and the bridge cannot be built.

Defendants will erroneously state that the city has the same power to build a bridge across the river as the Legislature has.

That is a dogmatic assumption of the entire question in dispute.

If the city has the same power to build the bridge across the river as the Legislature has, that is the end of the entire controversy.

So, when defendants assert that the city has the right to make any charter that the Legislature could have made, they erroneously assume the entire controversy.

The power of the state over municipal corporations has been adjudged time and time again by the Supreme Court of Oregon.

That the Legislature of the State of Oregon could require and cause the building of this bridge, the issuance of bonds, and could further require the city to turn the bridge over to the county, and the county to accept and operate the bridge at county expense, has been decided time and time again in the Supreme Court, and notably in the case of *Simon v. Northrup*, 27 Or. 487 to 506.

If the voters of the city have the same power as the Legislature, why is it that counsel concede and the lower courts decide that the latter part of this act requiring the county to take over and operate the bridge is invalid? The Legislature could require it to be so done. The Legislature is requiring it to be so done by the county with other bridges.

There is most rank inconsistency between the argument of defendants upon power to build a bridge across the river and their concession as to the invalidity of part of this act.

To establish the power of the Legislature in these matters, one has only to refer to the decisions of the Supreme Court of Oregon over and about the bridges in the City of Portland, all of which have been taken to the Supreme Court.

Winters v. George, 21 Or. 251.

Cook v. Portland, 20 Or. 580.

Mead v. Portland, 45 Or. 1.

Brand v. Multnomah Co., 38 Or. 79.

Lewis v. Portland, 25 Or. 133.

Horton v. Newport, R. I., 1 L. R. A. New Ser. 512 and Note.

State v. Oregon, 22 Or. 142.

Simon v. Northup, 27 Or. 487-506.

It would thus seem to be clearly established that the electors of the City of Portland have undertaken to grant a franchise from the state to the City of Portland to permanently appropriate a part of the property of the state, to-wit: the Willamette River.

That is an act of sovereignty of the highest kind, and is clearly included under the reasoning of *Straw v. Harris*, 103 Pac. Rep. 777, 780, 782.

Oregon v. P. G. E. Co., 52 Or. 515, 534.

State v. Scales (Okla.), 97 Pac. Rep. 587.

C. M. & M. Co. v. Johnson, 52 Or. 547.

Elliott v. The City, 121 Mich. 611.

Hume v. R. R. P. Co., 51 Or. 237.

Cook v. Dendinger, 38 La. Ann. 261, 263.

Nelson v. Homer, 18 La. Ann. 258.

State v. M. Y. Co., 189 Mo. 83 to 107.

Fragley v. Phealan, 126 Cal. 383, 386, 387 to 396.

Fawcett v. Pritchard, 14 Wash. 604.

State v. Warner, 4 Wash. 773.

City v. State, 4 Wash. 64.

In re Cloherty, 2 Wash. 137.

Tacoma v. City, 14 Wash. 288.

Commonwealth v. Ludwick, 151 Mich. 498.

People v. Johnson, 34 Colo. 143, 151-157.

15 Am. Eng. Ency. of Law (2d ed.), 357.

Montgomery v. Portland, 190 U. S. 89, 105 to 106.

Defendants can cite neither authority nor reason for their dogmatic assertion that the matter of a bridge and the franchise across the Willamette River, belonging to the State of Oregon, is a matter of exclusive interest to the State of Oregon itself, and it must be presumed that the state has approved.

On the contrary, the only way the state could approve would be by acts of which the court would take judicial notice.

The court may properly take judicial notice of the fact that the City of Portland applied to the Port of Portland for a franchise and the Port of Portland unofficially expressed its disapproval, and the city withdrew its application for a franchise and elected to try to stand upon the proposition that the city did not need a franchise to build this bridge from the Port of Portland, which raises a legal question for decision in this case. Also the Port of Portland has officially disapproved of the building of this bridge. Appellant offered in evidence the application to the Port of Portland and its action, and lower court erroneously excluded same from the evidence.

The defendants will assert that the Supreme Court of Oregon decided that plaintiff in error

could not raise the question of want of franchise across the navigable Willamette River. (111 Pac. Rep. 382.)

Kindinger v. City of Saginaw, 132 Mich. 396, is also cited as the authority for this decision.

The last paragraph of the opinion in that Michigan case contains a dictum to the effect that so long as public authorities are content it is no concern of a taxpayer whether the supervisors have taken proper action or not. In that case, the city was rebuilding an old bridge across the river, it had a franchise from the state and the United States for the erection of the old bridge, it had a specific permission from the Secretary of War to erect the new bridge, it had a special enabling act from the State of Michigan to erect the new bridge, and its proceeding was held to be in every way in strict accordance with the charter. Everything that has ever been contended for as a condition precedent to authorize the officers of a municipality and a municipality to build a bridge across a navigable river, had been each and all fully and strictly complied with in this case of *Kindinger v. City of Saginaw*, 132 Mich. 395.

In other words, in that Michigan case the city had exactly the same authority as has always been required in the City of Portland, and which has always been furnished the City of Portland when it built the other bridges across the Willamette River.

In other words, plaintiff in error is contesting this case at the bar because the City of Portland has

none of the authorizations and powers to build this Broadway Bridge, which the City of Portland has to build the Madison Street Bridge, the Morrison Street Bridge and the Burnside Street Bridge, but the City of Portland, in the case at bar, is attempting to build the Broadway Bridge without first obtaining the essential powers.

The case from Michigan, instead of being an authority for defendants, is a very strong authority for plaintiff in error, for it shows what the defendants ought to have in this case, but have not got.

It is for the Supreme Court of the United States to decide upon this writ of error whether or not plaintiff in error can raise this question and whether or not it raises a Federal question.

We confidently submit that it is the settled law of this land that plaintiff in error, a taxpayer, can and that it is his duty to raise this question before the bonds are sold and the bridge built in reliance upon the acquiescence of the taxpayers of the City of Portland.

4 Dillon's Mun. Corp. (5th ed.), Section 1579-1587.

Plaintiff in error respectfully contends that he is being deprived of the law of the land if he is not permitted to contest the invalidity of these bonds and taxes which the defendants are trying to put upon his property.

Plaintiff in error has come into court at the first opportunity to protect his property and the

questions should be decided upon their merits by the Supreme Court of the United States.

The defendants will also contend that the State of Oregon has given express authority to the City of Portland to build this bridge in other sections of the charter of the City of Portland. This contention is not correct for the following reasons:

The Port of Portland, a municipal corporation, was incorporated in 1891 by the Legislature of the State of Oregon and given jurisdiction over the Willamette river in Sections 3 and 13 of its charter.

Laws of Oregon, 1891, pages 791 to 795.

The cities of Portland, East Portland and Albina were consolidated in 1891 by acts of the Legislature.

See Laws of Oregon, 1891, pages 796 to 853.

In the first charter of consolidated Portland it was provided in Section 189 as follows:

"Section 189. Except as otherwise expressly provided or permitted by this act, the indebtedness of the City of Portland must never exceed, in the aggregate \$150,000, except that said city may, in addition thereto, incur an indebtedness of \$500,000 for the erection and furnishing of a city hall, in addition to the \$175,000 heretofore authorized for the purpose of furnishing the city and the inhabitants thereof with water; \$250,000 for the purchasing and improving city parks, and \$500,000 for building, buying, leasing or otherwise providing free bridges across the Willamette River; nor shall said city ever contract any debt or assume any liability in any manner whatever by means of which

it may be called upon or become bound to pay any sum of money at any time beyond the period of two years from the date of such contract or assumption, except by the issue of negotiable bonds."

See Laws of Oregon, 1891, page 844.

Also it was provided in Section 190 of the charter of consolidated Portland as follows:

"Section 190. The City of Portland has power and authority to provide by ordinance for dredging the bars in the Willamette River, and for improving and keeping improved the navigation of the same within and below the City of Portland; and in the exercise of such power and authority may provide and use all means necessary or convenient therefor, not prohibited by this act, including the levying and collecting of the tax provided for in Subdivision 2 of Section 37, and said city is hereby authorized and empowered to construct and maintain bridges across the Willamette River at any points within the limits of said city, not already occupied by bridges or ferry lines, with such suitable draws, openings as said city may deem proper, and it shall have power to purchase or lease any bridge or bridges already existing across said river within said city limits. Nothing contained in the act entitled 'An act to establish and incorporate the Port of Portland, and to provide for the improvement of the Willamette and Columbia rivers in said port, and between said port and the sea,' shall operate to prevent the exercise by the City of Portland of the power herein conferred to construct and maintain bridges across the Willamette River."

Laws of Oregon, 1891, pages 844 to 845.

The next charter of Portland was enacted in 1893, and also contained Section 206, as follows:

"Section 206. The City of Portland has power and authority to provide by ordinance for dredging the bars of the Willamette River, and for improving and keeping improved the navigation of the same within and below the City of Portland, and in the exercise of such power and authority may provide and use all means necessary or convenient therefor not prohibited by this act, including the levying and collecting of the tax provided for in Subdivision 2 of Section 36, and said city is hereby authorized and empowered to construct and maintain bridges across the Willamette River at any points within the limits of said city not already occupied by bridges or ferry lines, with such suitable draws, openings as said city may deem proper, and it shall have power to purchase, lease or condemn any bridge or bridges already existing across said river within said city limits. Nothing contained in this act, entitled, 'An act to establish and incorporate the Port of Portland, and to provide for the improvement of the Willamette and Columbia rivers in said port and between said port and the sea,' shall operate to prevent the exercise by the City of Portland of the power herein conferred to construct and maintain bridges across the Willamette River."

Laws of Oregon, 1893, pages 867 to 868.

The next charter of Portland was enacted October 17, 1898, and contained Section 227, as follows:

"Section 227. The City of Portland has power and authority to provide by ordinance for dredging the bars of the Willamette River, and for improving and keeping improved the navigation of the same within and below the City of Portland, and in the exercise of such power and authority

may provide and use all means necessary or convenient therefor not prohibited by this act, including the levying and collecting of the tax provided for in Subdivision 1 of Section 32, and said city is hereby authorized and empowered to construct and maintain bridges across the Willamette River at any points within the limits of said city not already occupied by bridges or ferry lines, with such suitable draws, openings as said city may deem proper, and it shall have power to purchase, lease or condemn any bridge or bridges already existing across said river within said city limits."

Laws of Oregon, Special Session, 1898, page 184.

Then the present charter of Portland was enacted in 1903.

Laws of Oregon, Special Session, 1903, pages . .

All these former charter provisions of the City of Portland were repealed by Section 426 of the present charter of Portland.

In place of those former provisions it was specially enacted under Section 3 of the present charter of the City of Portland as follows:

"The City of Portland shall be invested within its limits with authority to perform all public service and with all governmental powers, except such as are expressly conferred by law upon other public corporations and subject to the limitations prescribed by the Constitution and laws of the state, except as hereinafter provided."

Section 424 and sections 259 to 267 of the present charter of Portland expressly exclude from the operation in the City of Portland the park provisions found in the laws of 1899, pages 67 to 70.

Section 425 of the charter of Portland expressly adopts the bonding act found in the laws of Oregon 1893, page 171.

The provisions of the charter of Portland referred to by defendants as conferring this power are also found in the old charters, which also had express authority for the City of Portland to build bridges across the Willamette River which express authority to build bridges across the Willamette River the present charter of the City of Portland does not contain,

The present charter of Portland, Section 73, Subdivisions 1, 75, 76, 77 and 78, are similar to the charter of 1898 of Portland, Section 33, Subdivisions 13, 12, 14 and 31.

The charter of 1898 also had the further provision in regard to bridges across the Willamette River found in Section 227 thereof and set forth above.

No such provisions as to bridges across the Willamette River is found in the present charter of Portland as were in the old charters. They have all been repealed by the present charter of Portland, sections 3 and 426; thus it clearly appears that the present charter of Portland has no authority for the City of Portland to build bridges across the Willamette River.

See Section 114 of the present charter of Portland as amended in 1905, page 193, of the special laws of Oregon.

An examination of these charters demonstrate that the City of Portland has no franchise to build this bridge nor any power to do so, unless it is obtained by the amendment Section 118 $\frac{1}{2}$.

The real contention of defendant upon the subject of the authority of the City of Portland to build the Broadway Bridge across the Willamette River is that the electors of Portland amended the Portland charter by inserting Section 118 $\frac{1}{2}$, and thereby the electors of Portland amended the charter of the Port of Portland, a different municipal corporation, and conferred upon the City of Portland a special bridge franchise across the Willamette River, which is owned by the State of Oregon, to build this Broadway Bridge.

The question arises, have the constitutional amendments delegated to the electors of the City of Portland, one municipal corporation, the legislative power of the sovereign State of Oregon, to change the charter of not only the City of Portland, but to amend or repeal part of the charter of the Port of Portland, a different municipality?

If the electors of Portland can amend the Portland charter and thereby amend or repeal part of the charter of the Port of Portland, why cannot the electors of Portland amend the Portland charter and thereby amend or repeal the charter of St. Johns, or Rainier, or Astoria, or Port of Clatsop, or Port of Astoria, or of Oregon City, or of the City of Salem and vice versa?

Will we not have unseemly conflict or civil war between the different municipal sovereignties of

Oregon if the ruling contended for by defendants is declared to be the law?

It is not within the sphere of municipal power and action for one municipal corporation to limit the charter or powers of another municipal corporation.

People v. Humphrey, 23 Mich. 471-483.

Ex parte Anderson, 134 Colo. 73.

People v. Collins, 3 Mich. 368.

In *Winters v. George*, 21 Oregon 251, and 259, the Supreme Court of Oregon held:

"It must be conceded that the power of the Legislature over public corporations within the state so far as concerns their existence and boundaries, is practically without limit, unless restrained by some provision of the Constitution (citing cases), and several municipal corporations may be consolidated in one, even without the consent of the corporations affected, if the Legislature so provides."

Defendants will argue that all the former legislative power of the Legislature of the State of Oregon has been delegated to the electors of each municipality of the state, and the electors of each municipality act as the legislative agents of the State of Oregon in amending their municipal charters.

Therefore the electors of each municipality in a state can change the existence and boundaries of each and every other municipality in the state just the same as the Legislature formerly could do.

Plaintiff in error insists that that argument of defendants is erroneous.

Plaintiff in error insists that it is not possible for the people of the State of Oregon to give this destructive and contradictory power to the electors of each municipality in the state.

People v. Sours, 31 Colo. 360 in 385, 386.

People v. Johnson, 34 Colo. 143, 148-163.

Plaintiff in error insists that the amendments to the Constitution of Oregon do not attempt to give any such revolutionary power to the electors of the municipalities of the State of Oregon.

The state can not delegate its power without limitation as is attempted to be done in these constitutional amendments, and cities cannot exercise state powers.

Straw v. Harris (Or.), 103 Pac. 777.

Elliott v. City, 121 Mich. 611 on 614.

“The Legislature has power to delegate certain legislative functions to the legislative branch of a municipal government, and the Legislature might empower the Common Council of the City of Detroit to make by-laws or ordinances in the nature of legislative enactments, but in delegating this authority it **must point out specifically the powers delegated, and the extent of these powers.** The act under consideration goes further than this, and practically abandons all legislative functions on the question of amending or repealing city charters, and

it transfers that authority or delegates that authority to the mayor, etc."

The constitutional amendments giving power to the municipalities to amend their charters only attempt to give power to electors of municipalities to enact municipal legislation and proper municipal charter amendments, and appellant contends that the exercise of state power is beyond the electors of a municipality.

A municipal corporation can have no other source than sovereign power, nothing less than sovereign power can confer the supreme faculties upon any creature.

Straw v. Harris, 54 Or. 424.

City of McMinnville v. Howenstine, 109 Pac. Rep. 81, 83 and 84.

State v. Scales, 97 Pac. Rep. 587.

The state has not attempted in these constitutional amendments to delegate power to the electors of one municipality to interfere with another municipality.

The state could not delegate its powers to one municipality to interfere with another municipality because if that was to be done it would disrupt the state government, make the real state government the different municipalities and destroy the State of Oregon, inviting civil war between the different municipalities of the state and resulting in state suicide.

- Straw v. Harris, 103 Pac. Rep. 777.
 S. C. 54 Oregon, page 627.
 Elliott v. City, 121 Mich. 611.
 Cook v. Dendinger, 38 La. Ann. 261-263.
 Nelson v. Home, 48 La. Ann. 258.
 S. C. 19 Sou. Rep. 271.
 State v. M. T. Coe, 189 Mo. 83 to 107.
 S. C. 88 S. W. Rep. 41.
 Fragley v. Phelan, 126 Cal. 383, 386, 387, 389,
 395, 396.
 State v. Scales, 97 Pac. Rep. 587.
 McMinnville v. Howenstine, 109 Pac. Rep. 81.
 People v. Hurlburt, 24 Mich. 44.
 Fawcett v. Pritchard, 14 Wash. 604.
 S. C. 33 L. R. A. 674.
 Borough of West Philadelphia, 5 Watts. &
 Serg. Rep. 281, 283.
 The People v. Collins, 3 Mich. Rep. in 416,
 417.
 Ex parte Anderson, 134 Cal. 73, s. c. 66 Pac.
 Rep 194.
 People v. Humphrey, 23 Mich. 471, 481, 482,
 483.
 People v. Sours, 31 Colo. 369, 385, 386.
 People v. Johnson, 34 Colo. 143, 151-157.
 In re Cloherty, 2 Wash. 137.
 City v. State, 4 Wash. 64.
 Tacoma v. City, 14 Wash. 288.

Plaintiff in error cannot understand how the City of Portland can repeal or alter or amend the charter of the Port of Portland and take away from the Port of Portland part of its power and jurisdiction over the Willamette River.

Montgomery v. Port of Portland, 190 U. S. 89.

If the City of Portland cannot build this bridge without the consent of the State of Oregon, acting through the Port of Portland, the corporation having jurisdiction of the river, plaintiff in error urges that it is premature for the City of Portland to try to issue bonds and tax appellant to pay them until the City of Portland has obtained a lawful right to invade the sovereignty of the State of Oregon and invade the jurisdiction of the Port of Portland by building this Broadway Bridge across the Willamette River.

That the building of a bridge across the Willamette River is the exercise of state power, not municipal power, has been clearly decided in the case of *Simon v. Northrup*, 27 Or. 496, and cases there cited.

The city officials and electors of the City of Portland are trying to grant a franchise to build a bridge across the Willamette River which formerly could only have been done as a state matter by the Legislature of the State of Oregon, and now done by the people of the entire State of Oregon by initiative.

Straw v. Harris, 103 Pac. Rep. 777.

City of McMinnville v. Howenstine, 109 Pac. Rep. 81.

Winters v. George, 21 Or. 251.

State v. George, 22 Or. 142.

Cook v. Port of Portland, 20 Or. 580.

As the granting of a franchise across the Willamette River and building a bridge across the Willamette River is a state power and not a municipal power, the right of the voters of Portland to grant that franchise across the Willamette River and across the property of the State of Oregon, and to amend and limit the charter of the Port of Portland is a state power and not a municipal power.

The right so to do has not been granted to the municipality of Portland by the constitutional amendments. See *City of McMinnville v. Howenstine*, 109 Pac. Rep., on page 83, where it is held that in the absence of clear and express declaration to that effect by the source from which the authority emanates, only those powers incident and germane to the city government may be deemed delegated, and they are always subject to control and regulation by the law making department in the manner provided by the Constitution.

It is a well settled rule of construction that grants of franchises must be strictly construed against the grantee and in favor of the public. The franchise must be plainly given in the charter or it does not exist.

- C. E. R. Co. v. Cleveland, 204 U. S. 116.
 Oregon v. P. G. E. Co., 52 Or. 502.
 B. C. M. Co. v. Baker City (Or.), 113 Pac.
 R. 9, 14.
 City of Joseph v. Joseph W. Co. (Or.), 111
 Pac. R. 864, 865, 866.
 36 Cyc. 1363.

The nature of the municipal corporation has not been changed, nor has its relation to the state been changed in Oregon.

Even if the electors of Portland have power to amend the charter of the Port of Portland and have power to grant to the City of Portland a franchise for the Broadway Bridge across the Willamette River and thus obstruct the harbor in the Willamette River, the said so-called Section 118 $\frac{1}{2}$ in the charter of Portland does not in express terms attempt to repeal or amend the charter of the Port of Portland.

Therefore, the so-called Section 118 $\frac{1}{2}$ of the charter of Portland and the charter of the Port of Portland must be read and construed together as one act.

- Sandys v. Williams, 46 Or. 327, 331, 332.
 Winters v. George, 21 Or. 251.
 State v. County Court, 101 Pac. Rep. 907, 910.
 City of McMinnville v. Howenstine, 109 Pac.
 Rep. 83.
 Straw v. Harris, 54 Or. 424.

Montgomery v. Port of Portland, 190 U. S.
89.

It would follow that the two charters of these respective municipalities construed together would require the City of Portland to get a franchise from the Port of Portland before the City of Portland could go ahead and issue bonds to obtain money to build this Broadway Bridge and build this Broadway Bridge.

The charter of the Port of Portland is valid and unaffected by the so-called Section 118½ of the Portland charter.

Plaintiff in error is entitled to a reversal of this case because the City of Portland has no franchise from the Port of Portland to build this bridge, and the City of Portland is illegally attempting to issue municipal bonds, which, if issued, would be binding obligations upon the property of appellant and appellant would be taxed to pay them.

Plaintiff in error contends that the city is not given express authority by the legislature in its charter to build this Broadway Bridge, and that it is not possible for the electors of the City of Portland to exercise this state power, and it must be exercised by the voters of the entire State of Oregon under the initiative.

The defendants will contend that under the constitutional amendment the city could grant this franchise for the Broadway Bridge across the Willamette River belonging to the State of Oregon, as

the electors of the City of Portland would be acting as agents of the state and exercising state power, and the state has vested power in the city to amend its own charter, and that the city so doing would be acting as representatives of the state, and the power to so amend the charter and so grant this franchise across the state's property flows directly from the State of Oregon.

The above authorities cited by plaintiff in error and the authorities hereafter cited and the reasons cited by plaintiff in error demonstrate that the claim of the defendants is erroneous. The state can not delegate state law making power on state matters to mere municipalities or people of mere municipalities which are less than the state.

**DOES THE CITY OF PORTLAND HAVE
POWER TO BUILD THIS BRIDGE UNDER
ITS SECTION 73, SUBDIVISION 1, UNDER
THE POLICE POWER?**

We have shown that the building of a bridge across the Willamette River is a state power.

Simon v. Northrup, 27 Or. 496.

The discussion of whether or not bridges can be built under the police power is a moot question in this case, and ought not to be discussed for the reason that the City of Portland is not attempting to issue these bonds and build this bridge in this case under the police power, but is attempting to do it

under this special so-called act, Section 118 $\frac{1}{2}$ of the charter of the City of Portland, whereby the voters of the City of Portland and the Council of the City of Portland have attempted to give a special franchise to the City of Portland across the property of the State of Oregon, and repeal or amend the charter of the Port of Portland.

Under the charter of the City of Portland, Section 72, Subdivision 24, there is an express provision that the city has no power to issue its bonds for any indebtedness or for any purpose or to increase the bonded indebtedness of the city in any amount, or for any purpose whatever.

Under these charter provisions it is idle to argue about the city having power to build bridges across the Willamette River under the police power.

The city is attempting to issue these bonds and build this bridge under a special power claimed to be Section 118 $\frac{1}{2}$ of the charter.

Whether the city has that power under Section 118 $\frac{1}{2}$ of the charter is the only question involved in this case.

Does Section 76 of the charter of Portland give power to build a bridge across the Willamette River?

The Supreme Court of Oregon in the first decision (111 Pac. Rep. 382 says: "Section 76 of the charter authorizes the city to acquire, construct and maintain bridges and ferries, and this could have no application to any bridges or ferries except over the Willamette River."

The Supreme Court of Oregon should have set forth in its opinion said Section 76 of the charter.

Said Section 76 is as follows:

"Section 76. The Council of the City of Portland shall at all times, under the limitations herein set out, have power to provide by ordinance for lighting the streets and all public places in the city and furnishing water to the inhabitants thereof; to provide for the acquisition, ownership, construction and maintenance of water works, gas works, electric light works, steam, water or electric power works, heating works, telephone lines, street railways, bridges and ferries, and such other public utilities as the Council may designate; provided, however, save as otherwise prescribed in this charter, no contract or agreement for the purchase, condemnation, ownership, construction or operation by the city, of any public utility shall be entered into by the Council without first submitting such proposed contract or agreement to the qualified voters of the city in accordance with the provisions of this article."

The rest of said Chapter V of the Portland city charter, Sections 75 to 92, should also be read in connection with said Section 76 to make the section clearly understood.

All plaintiff in error should be required to do in answer to this is to call attention to the above printed Section 76 and state that the section provides that it can only be invoked upon complying with special election provisions provided in Sections 77 to 92 of the charter, which complaint alleges, and it is admitted, has not been done.

All plaintiff in error should be required to do in addition is to call the court's attention to the fact

that as the city is **not attempting** to proceed under Section 76 of the charter, that said section is entirely foreign to any discussion in this case.

The Supreme Court of Oregon (111 Pac. Rep. 382) further says:

"In the emergency clause to the same charter the necessity for constructing new bridges is enumerated."

The Supreme Court of Oregon should have printed said emergency clause in its opinion. Said emergency clause is as follows:

"Section 427. Whereas, there are several bridges upon important thoroughfares and car lines in the City of Portland, now old and in a dilapidated and ruinous condition, dangerous to life and property; and

Whereas, there is an immediate necessity for the construction of new bridges in the place of said old ones in order to provide for the safety of the people of said city; and

Whereas, there are no ways or means by which under the present charter of said city new bridges can be constructed in place of the old ones; and

Whereas, the foregoing act provides ways and means available at once for the construction of new bridges; and

Whereas, there is otherwise a necessity for the immediate adoption of the foregoing act to insure the health, peace and safety of the people of Portland,

Therefore, this act shall take effect and be in force from and after its approval by the Governor."

The reference to new bridges in said emergency clause of the charter of 1903 has no reference to bridges across the Willamette River, as an examination of the provisions of the charters set forth in this brief will demonstrate.

In fact, if the charter provided for new bridges across the Willamette River there would be no need to amend the charter by enacting Section 118½.

All courts should take judicial notice that the bridges across Marquam's Gulch, in the south part of the City of Portland, were unsafe, and the former charters of Portland did not provide for rebuilding them, except out of the general fund, and there was no money in the general fund of the City of Portland for that purpose, nor provision to raise it by taxation. Also the bridges across the Cornell Canyon in the Willamette Heights region were in the same condition, and bridges across Sullivan's Gulch, on the east side of the river, were in the same condition.

In the charter of 1903 it was intended to rebuild these bridges across gulches under Sections 373 and on of the charter of the City of Portland as street improvements and to make a district of a sufficiently large portion of the city to put the costs as a special and peculiar benefit upon property without confiscating the property. Also there were made or contemplated to be made in that way, fills to take the place of bridges or elevated roadways.

It is current history, of which the Supreme Court should take judicial notice, that bridges across Sullivan's Gulch, and fills in South Portland,

and bridges across the Cornell Canyon across to Willamette Heights were started under such provisions of the charter of 1903, and special assessments were attempted to be made therefor. Such special assessments were being complained against by the inhabitants of the City of Portland, who would be taxed therefor, by special assessment, and that as a result thereof the Legislative Assembly of 1905, in an amendment to the charter of the City of Portland, amended Section 114 thereof to provide for a special tax of not more than 2 mills on the dollar for the purpose of paying for the construction of bridges in said city, and said taxation shall be appropriated to the fund to be known as the special bridge fund, said special bridge fund shall be used only for the purpose of paying for the construction of bridges in the said city elsewhere than across the Willamette River, the estimated cost of which by said city shall not be less than \$15,000. **And also for the purpose of paying for any bridge, or bridges not across the Willamette River,** which were constructed in and by said city during the year 1904, or which are now under course of construction or under contract to the said city and which have not been paid for prior to January 1, 1905, provided that this provision shall not be construed so as to include elevated roadways, tramways or any structures other than bridges across gulches and ravines.

See Laws of Oregon 1905, pages 193-194.

The judicial knowledge of the court on the bridge situation in Portland should be properly informed, and a correct and accurate historical statement of that power and what was done thereunder be stated in the opinion of the Supreme Court of the United States in this case.

Plaintiff in error respectfully urges that even the Supreme Court of Oregon cannot, by its erroneous opinion, change the local history of the City of Portland in bridging Marquam's Gulch, in South Portland, Cornell Canyon, in western Portland, and Sullivan's Gulch, in East Portland.

Plaintiff in error respectfully urges that the power, even of the Supreme Court of Oregon, is limited by the facts of history, and that historical facts have been erroneously stated as to the power in regard to bridges in the charter of the City of Portland for 1903, and what was done thereunder and what can be done thereunder.

Plaintiff in error respectfully urges this Supreme Court to correct this most flagrant error and determine for itself what is the charter power in this regard, so that the United States Supreme Court can determine for itself whether there are Federal questions involved and their merits as Federal questions.

Scott v. McNeal, 154 U. S. 34.

Plaintiff in error urges the Supreme Court to consider that the city is not attempting to issue any bonds and build any bridge at Broadway by virtue

of Section 76 of the charter of the City of Portland, and that is not in issue in this case.

Plaintiff in error urges the Supreme Court to realize that the statement in regard to Section 76 of the charter of the City of Portland is a most flagrant instance of obiter dicta.

The Supreme Court of Oregon did not repeat this error or refer to it in the second opinion (112 Pac. Rep. 402).

Plaintiff in error urges upon the Supreme Court to consider that the City of Portland has attempted to enact Section 118½ to the charter of the City of Portland, and issue two million dollars of bonds and build the Broadway Bridge under Section 118½, and only under Section 118½, therefore the only issue in this case is whether or not there is any Section 118½ to the charter of the City of Portland, and its validity.

Plaintiff in error urges upon the Supreme Court that Section 76 is not in issue in this case.

Plaintiff in error urges upon the Supreme Court the terms of Section 76 of the charter of the City of Portland, and that under the terms of Section 76 of the charter of the City of Portland it has no force or effect until two special elections have been held in accordance with Sections 77 to 92, and there is no contention that there has been any election at all under said Section 76, nor that any bonds are to be issued thereunder or bridge built thereunder.

Also plaintiff in error urges to the Supreme Court that even under Section 76 there is no grant

of a franchise across a navigable river, owned by the State of Oregon, by Section 76. Grants of franchises and grants by the sovereign State of Oregon to municipalities are strictly construed. The Section 76 is entirely too indefinite to grant the power to build this Broadway Bridge, even if Section 76 was complied with, which has not been done.

C. E. R. Co. v. Cleveland, 204 U. S. 116.

Oregon v. P. G. E. Co., 52 Or. 502.

B. C. M. Co. v. Baker City (Or.), 113 Pac. R. 9, 14.

City of Joseph v. Joseph W. Co. (Or.), 111 Pac. R. 864, 865, 866; 36 Cyc. 1363.

The decision in this case should be confined to what is in issue in the case.

If this decision upon Section 76 is to be sustained it will be most far reaching in its effects, because it will point out a simple method of procedure whereby bonds without limit can be voted at any city election for the purchase of public utilities, and the City of Portland will launch into municipal ownership upon a most wide scale and provide for the ownership, construction and maintenance of water works, gas works, electric light works, steam, water or electric power works, heating works, telephone lines, street railways, bridges and ferries and such other public utilities as the Council may designate.

To have a dictum of the Supreme Court of Oregon giving the Council and electors such power of

municipal ownership or such power to issue bonds is appalling.

Even Section 76 of the charter is not accurately stated by the Supreme Court of Oregon in its opinion, and it will be for the best interests of the people of the City of Portland to have this matter fully and carefully considered and decided by the United States Supreme Court before it is everlastingly too late.

Plaintiff in error is not being given the benefit of the law of the land when such flagrant errors of fact are made the basis for allowing the issuance of bonds against his property and taxing him in large amounts.

The Supreme Court of the United States ought to protect plaintiff in error, a citizen of the United States, from such perversion of the law.

As the defendants were aware that the decision of the state courts in regard to the consent of Congress against plaintiff in error was absolutely erroneous, after this writ of error was obtained defendants obtained the passage of the following act of Congress:

(Public, No. 493.)
(S. 10274.)

An act to authorize construction of the Broadway Bridge across the Willamette River at Portland, Oregon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the City of Portland, in the

County of Multnomah, State of Oregon, is hereby fully authorized and empowered to construct and build a bridge to be known as the Broadway Bridge, with appropriate approaches and terminals with a clearance of not less than sixty-five feet above high-water mark and not less than ninety-three and thirteen one-hundredths feet above low-water mark, city datum, across the Willamette, a navigable river, in said city, substantially as follows, to-wit: From Broadway street at or near its intersection with Larrabee street on the east side of said river, and following the line of Broadway street extended westerly in its present course to a point at or near its intersection with Seventh street on the west side of said river; thence southerly and easterly to a point at or near the intersection of Sixth and Irving streets in said city: Provided, that said bridge shall be constructed and maintained in accordance with the provisions of the act entitled "An act to regulate the construction of bridges over navigable waters," approved March twenty-third, nineteen hundred and six.

Sec. 2. For all purposes the consent of Congress, granted by this act, shall be held as relating back to the commencement of the project, and everything done in connection therewith.

Sec. 3. That the right to alter, amend or repeal this act is hereby expressly reserved.

Approved March 4, 1911.

Said Section 118½ attempts to deprive plaintiff of his property in error without due process of

law in violation of the 14th amendment to the United States Constitution.

It is not possible for the Council of the defendant city and the electors of the defendant city to themselves enact a law, said Section 118½, by which they can put a tax upon the property of plaintiff—that is **not** a municipal purpose.

In other words, the power to sell bonds and put a mortgage and tax upon the taxpayers of the City of Portland, attempted to be given in said Section 118½, must come from the sovereign people of the State of Oregon, and it has not been granted by the legislature or by the sovereign people of the State of Oregon to the Council and electors of the City of Portland.

The power to tax is one of the highest attributes of sovereignty, and includes the power to destroy.

Under our system of government that power must be given by the legislature of the state or the sovereign people of the state, and limits must be placed upon the power of municipalities to tax, and the initiative and referendum amendments granting power to amend charters and enact charters granted to the voters of municipalities cannot be constitutionally construed to give the voters of municipalities power to issue bonds and place taxes upon its citizens, free from the control of the legislature of the state and the sovereign people of the state.

Article XI., Sec. 5, Constitution of Oregon.

Straw v. Harris (Or., 103 Pac. Rep. 777.

Corbett v. Portland, 31 Or. 407, 417, 419, 420.
McMinnville v. Huvenstine, 109 Pac. R. 81.

To grant such a power is to commit state suicide and resolve the State of Oregon into as many smaller states as there are municipalities within the state. It would make a confederacy of cities within the State of Oregon weaker than the original confederacy of the Thirteen colonies. All our system of government would be completely destroyed by allowing such doctrine to be the law of the land.

A municipal corporation can have no other source than sovereign power, and nothing less than sovereign power can confer the supreme faculties upon any creature.

28 Cyc. 132, 133, 135, 136, 235, 236, 241, 242, 243.

State v. Scales, 97 Pac. Rep. 587.

Elliott v. State, 121 Mich. 611.

State v. Haines, 35 Or. 379, 381.

The power of the state cannot be invaded by an amendment to the charter of cities by electors of cities.

Peo. v. Johnson, 34 Colo. 143, 151-157.

Cook v. Dendginger, 38 La. Ann. 261, 263.

Nelson v. Homer, 48 La. Ann. 258.

State v. M. T. Co., 189 Mo. 83 to 107.

Frayley v. Phelan, 126 Cal. 383, 386, 387, 389, 395, 396.

State v. Scales, 97 Pac. Rep. 587.

Straw v. Harris, 103 Pac. Rep. 777.

McMinnville v. Huvenstine, 109 Pac. R. 81.

Williams v. Peo., 38 Colo. 497, 502-509.

Elliott v. City, 121 Mich. 611.

Peo. v. Sours, 31 Colo. 369.

Plaintiff in error urges that under the Constitution of the United States of America said Section 118½ of the charter of the City of Portland is unconstitutional and void, for the reason that the electors of a municipality cannot exercise the powers of the sovereign state in state matters, and require plaintiff to govern his conduct in state matters and pay taxes in state matters at the behest of the electors of a municipality.

Plaintiff is a citizen not only of the City of Portland, State of Oregon, but also of the United States of America.

Plaintiff is entitled to the protection which organized government offers to the individual.

Of this protection appellant would be denied if the acts of respondents are upheld and the decree of the lower court affirmed.

U. S. v. Cruikshank, 92 U. S. 542.

Ex Parte Ah Fook, 49 Cal. 402.

Holden v. Hardy, 169 U. S. 389.

Loan Ass'n. v. Topeka, 20 Wallace 655.

Parker v. Commonwealth, 6 Barr 507.

Maynard v. The Board of Commissioners, 84 Mich. 228-239.

Downes v. Bidwell, 182 U. S. 244, 281, 283, 285, 290, 291.

The People v. Humphrey, 23 Mich. 471, 481, 482, 483.

Appellant especially urges that it is not within the constitutional power or sphere of municipal action for the voters of a municipality or the officers of a municipality to exercise state powers, such as building a bridge across a navigable stream, and issuing bonds and levying taxes.

Under the proceedings of the respondents and the opinion of the lower court the Council and electors of Portland are attempting to require plaintiff to conform his conduct in state matters, in tax matters, to a rule of conduct, or law, enacted by mere numbers of people, assemblages of people, in violation of constitutional proceedings, and in violation of constitutional limitations, and therefore, in fact, only a mob, and this mob—illegal mob—is attempting to tax plaintiff and take his property and his rights away from him.

This is in violation of the Constitution of Oregon and the Constitution of the United States, as is fully set forth in the amended complaint.

This is an attempt to set up the despotism of a mob, and the despotism of a mob is as arbitrary and complete as the absolutism of a despot. Both may, if they choose, rule without reason. Both account

only to themselves; neither is responsible to the whole people.

Nor could it be contended that in the absence of expressed guaranty in the Oregon Constitution and the express guaranties in the Federal Constitution, all set forth in the amended complaint, could it be otherwise.

The right of a representative form of rule to a government in which every subject shall be heard and represented, rests on broader grounds than the fourth clause of Article IV. of our Federal Constitution.

It is an inherent attribute of citizenship of the United States which no state or its people may impair.

Plaintiff in error urges that this court should not compel obedience to the enactments of the people of a municipality in state matters, in matters which are not purely municipal.

To turn the sovereign power of the State of Oregon over to the electors of a municipality is to destroy absolutely the principles of representation and of a republican form of government, and organize a pure democracy within the limits of a municipality and confer upon that municipal democracy the sovereign powers of the State of Oregon, which is nothing more than allowing the affairs of the state to be run by an oligarchy consisting of the citizens of a municipality, which are a mere handful of the people of the entire state.

The despotism of a majority of the voters of a municipality to participate in a municipal election,

and who are in fact a minority of the qualified electors of a municipality, makes the most insufferable kind of a municipal despotism.

When that insufferable municipal despotism is given the power of the entire State of Oregon it becomes revolutionary, unbearable, absolutely the end of the state.

Peo. v. Johnson, 34 Colo. 143, 151-157.

Martin's Executors v. Martin, 20 N. J. Eq. 421, 423.

Ex Parte Anderson, 134 Cal. 73.

S. C. 66 Pac. Rep. 194, 195, 196.

People v. Humphrey, 23 Mich. 471, 481, 482.

Peo. v. Sours, 31 Colo. 369, 385, 386.

Plaintiff in error contends that no binding rule of conduct can be created, no law can be made, no tax can be levied except in accordance with the settled forms of our republican government.

Due process of law means not only that there shall be a procedure sanctioned by the well-established principles of right and justice, but it must be a procedure prescribed by law.

The edicts of the electors of a municipality expressed at an election cannot be the basis of due process of law, the basis for taxing a man's property, the basis for the exercise of state power, however fair the steps prescribed for holding the election of a municipality may be.

Laws must emanate from the law-making power, and in a constitutional republic that power can only be a representative legislature.

Plaintiff in error insists that these acts complained against are void under the implied powers of the Constitution, and that acts are frequently declared invalid in violation of the implied powers of the Constitution.

See Tiedeman's unwritten Consti. of U. S.,
page 43.

Holden v. Hardy, 169 U. S. 389.

Loan Ass'n. v. Topeka, 20 Wallace 655, where the Supreme Court of the United States says that the government which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, was after all but a despotism. It would be a despotism of the many, of the majority, but none the less a despotism.

It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security which is essential to that happiness, under the unlimited dominion of others.

The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere.

The courts of this country exercise the power of declaring unconstitutional acts which are done in violation of constitutional limitations.

Plaintiff in error asks for the exercise of that power in this case to protect the individual.

Plaintiff in error, as a citizen, is entitled to the exercise of the power of the courts for his protection.

Parker v. Commonwealth, 6 Barr. 507.

Maynard v. Board of Commissioners, 84 Mich. 228, 239.

Downes v. Bidwell, 182 U. S. 244, 281, 283, 285, 290, 291.

People v. Humphrey, 23 Mich. 471.

U. S. v. Cruikshank, 92 U. S. 542.

Ex Parte Anderson, 134 Cal. 73.

X.

The Supreme Court of Oregon committed error in deciding that the pretended Section 118½ is invalid in so far as it attempts to impose the care and maintenance of the Broadway Bridge upon Multnomah County, and then holding that said clause is severable from the rest of the section, and the remainder of the section is valid, as thereby the Supreme Court of Oregon attempted to legislate and authorize the taxation of plaintiff in error and deprived him of the law of the land.

Part of Section 118½ Invalid—All Must Be Invalid.

It being alleged and admitted that part of the act requiring the county to take over and operate the city property is invalid, all of the act must be invalid.

Reynolds v. Conn (Ky.), 49 S. W. R. 969, 970.

Howard v. R. R. Co., 207 U. S. 463, 499, 515.

Baldwin v. Franks, 120 U. S. 678.

The rule applied by the courts to acts passed by the legislature cannot be correctly applied to statutes enacted under the system of amending charter by direct vote of the people, for the following reasons:

An act passed by the state legislature is enacted by the sovereign law-making power, which is all the legislative power of the sovereign, and is without limit except as and only so far as it is limited by the Constitution of the state and the Constitution of the United States, the federal laws, treaties, etc.

Therefore such an act of the sovereign law-making power of the legislature must be held valid unless it appears to be in conflict with a superior provision and invalid beyond a reasonable doubt.

It is upon this account that the court sometimes hold a part of a statute valid and a part invalid, as when the valid portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent.

26 Enc. of Law (2d ed.), 570, 571, and cases cited in the Notes.

But an entirely different situation is presented where an act is attempted to be passed by the council of a municipality which only has limited delegated power, submitting a proposition to the voters of a municipal corporation, which voters only have a delegated, limited power, and said proposition is voted upon by the voters in the exercise of a limited, special, delegated, law-making power.

When any municipal council or any body of people undertake to exercise a limited, special, delegated power and create something, do something, the limited power must be exercised in the mode and manner provided, in order for the thing to be created or done.

Kadderly v. Portland, 44 Or. 118.

Under the law governing the case at bar the council must frame and submit by resolution the proposition to the electors, who must vote for or against the proposition as submitted to them by the council. If part of the proposition is invalid, all must be.

21 Ency. Law (2d ed.), 45, 70.

Stern v. North Fargo, 122 N. W. Rep. 409.

Gas & Water Co. v. City, 57 Oh. St. 374, 380, 384.

Skinner v. Santa Rosa, 107 Cal. 464 to 476.

Alysmore v. Seattle, 48 Wash. 42, 48, 49.

21 Am. Eng. Enc. of Law (2d ed.) 33, 45, 47.

Tukey v. Omaha, 54 Neb. 370, 379.

Howard v. R. R. Co., 207 U. S. 463, 499, 515.

Baldwin v. Franks, 120 U. S. 678.

No one can tell how the council or voters would have voted upon the remaining and changed proposition if it had been changed by removing the invalid portion before it was submitted to the council or to the voters.

Gas & Water Co. v. City, 57 Oh. St. 374, 380, 384.

No one can exercise the power of the voters but the voters themselves.

No one can exercise the power of the council but the council.

If the court attempts to sustain part of the act, the court would attempt to usurp and perform the functions of the council and voters. The court would attempt to exercise the limited, special, delegated, law-making power which can only be exercised by the council and the voters.

It is not written in the Constitution of Oregon nor in the statutes of Oregon that the courts of Oregon have any such law-making power.

The courts can only interpret the law passed by the law-making power, and not pass the law.

State v. Simon, 20 Or. 365, 371 to 376.

State v. Smith (Or.), 107 Pac. 980 on 984.

Hood River L. Co. v. Wasco County, 35 Or. 508.

Pacific University v. Johnson, 47 Or. 450.

Howard v. R. R. Co., 207 U. S. 463, 499, 515.

Baldwin v. Franks, 120 U. S. 678.

If the court should attempt to hold that the court will say that a part of this attempted act is invalid, that the balance is valid, the court would itself usurp legislative functions, violate the Constitution of the State of Oregon and of the United States of America, and the judgment would be void upon its face and subject to collateral attack.

Hanley v. City of Medford (Or.), 108 Pac. Rep. 188, 192, 193 and cases cited.

Hovey v. Elliott, 167 U. S. 409.

Scott v. McNeal, 154 U. S. 34.

Atty-General v. Lowney, 199 U. S. 233, 239.

We respectfully contend that this invalid part of this act is so connected with and so modifies the rest that it could not be held severable if it was the act of the legislature.

The case of Simon v. Northrup, 27 Or. 487, will be pressed upon the attention of the court by the defendants as an authority that if part of the act is invalid, the rest will be valid.

I have examined the record in that case and the briefs in that case. They are printed and in the

law library of Multnomah County, are also in the state library at Salem, and an examination thereof will demonstrate that there was no contention made in that case, that if part of the act was invalid, all would be invalid. The only effort made on the part of the county authorities in that case was to escape payment of the interest and principal of the bridge bonds of the City of Portland, and the county officials established that and did not urge that the effect of establishing that would be to render the entire act invalid. A case can hardly be considered authority upon a proposition that was neither discussed in the briefs of counsel nor in the opinion of the court.

O. T. Co. v. Portland, 47 Or. 1.

Moreover, the act construed in *Simon v. Northrup*, 27 Or. 487, is an act passed under the sovereign power of the legislature of a sovereign state, which is all powerful except where expressly limited by the Federal Constitution or the State Constitution.

It would seem to me to be a very dangerous doctrine to be promulgated that a proposition can be submitted to the voters of a municipality, part of which is unconstitutional and void, and yet the remainder remain valid. There ought to be some means of having certainty in the enactment of laws by the electors of a municipality.

It will be urged that the county officials and the state officials have discretion as to whether the county will take possession and operate this bridge belonging to the city if built.

I know of no authority, and none has been cited, which will authorize or justify the officers of the county, a municipal corporation, to take possession of the property of the City of Portland, a municipal corporation, and operate it and spend the money of the county upon it.

B. & C. Com., Secs. 912, 2591, 2518, 2520, 2521, 2650.

If that is the law, then why cannot the officers of the county take possession of all the property of the City of Portland and perform the functions of the City of Portland generally, and defray the expenses of the City of Portland generally?

Why cannot the county take possession of the fire apparatus and fireboat and operate it?

Why cannot the county take possession of the City Hall and operate it and pay the expenses?

Why cannot the county take possession of the city streets and keep them in repair and clean them at the expense of the county?

In short, where is the authority of the city officials and the county officials to interchange the respective duties and the respective properties and commingle them between the County of Multnomah and the City of Portland?

The legislature of the state and the courts went to the very verge of what can be constitutionally and lawfully done in that respect in the case of *Simon v. Northrup*, 27 Or. 487. The Constitution ought not to be extended to give the council and

voters of the municipality of Portland and the county commissioners for the County of Multnomah, State of Oregon, unlimited discretion over the mutual property of the City of Portland and also of that of the County of Multnomah.

Defendants will contend that the Supreme Court has passed squarely on this question in the case of *Simon v. Northrup*, 27 Or. 487.

In making that contention defendants are entirely in error.

An examination of the briefs in *Simon v. Northrup* and the opinion of the court will show that the question of whether or not a part of the act was severable, and therefore could be considered invalid and not affect the other part of the act, was neither raised in the briefs nor discussed in the opinion of the court, and was assumed to be so without discussion.

The act involved in the case of *Simon v. Northrup*, 27 Or. 487, was passed by the legislature of the State of Oregon, and the power of the legislature of the State of Oregon to require a bridge built by the City of Portland under state authority, to be taken over by the County of Multnomah and operated and repaired, has been fully determined and established in the case of *Simon v. Northrup*, 27 Or. 487, so that respondents assume the entire controversy when they cite said case.

If Section 118 $\frac{1}{2}$ had been passed by the power which passed the act involved in *Simon v. Northrup*,

27 Or. 487, no one could contend that the act would not be valid as written.

The part of the act that is invalid was an inducement for the passage of the rest of the act, and therefore is not severable under the established rule of construction of statutes.

State v. Pointer, 59 Neb. 433, 434.

Connelly v. S. P. Co., 184 U. S. 565.

The reason why the courts cannot hold severable and valid parts of acts passed by vote of the electors is that the acts of voters in passing amendments to charters is the exercise of a special limited law-making power which must be exercised in the mode and manner provided by law, and no one can say what the electors would have done had the valid part of the act been submitted to them for their approval or disapproval.

This was well reasoned in the case of

Hunt v. Fawcett, 8 Wash. 396, 399, 400, 401.

Gaston Water Co. v. City, 57 Ohio St. 374, 380, 384.

Therefore the Supreme Court of the United States on this writ of error should determine for itself whether this part of said Section 118½, to-wit, "After the construction of such bridge the Executive Board, or its successors in office, shall surrender and deliver the possession of the same

to the County Court of Multnomah County, State of Oregon, and such court shall operate, control and manage the same, and keep the same in repair in the same manner as other bridges crossing the Willamette River within the City of Portland are operated, controlled and managed as required by law," is valid or invalid, and if invalid whether the rest of the Section 118½ can stand or not. It is necessary for the Supreme Court of the United States to do this in order to pass upon the federal question involved.

Scott v. McNeal, 154 U. S. 34.

Atty-General v. Lowney, 199 U. S. 233, 239.

Section 118½ is so indefinite, uncertain and incomplete that the legislative intent cannot be ascertained.

Smith v. Dublin, 113 Ga. 833, 838.

Warren v. Brannon, 109 Ga. 835, 838, 840.

Stern v. Fargo (N. D.), 122 N. W. 406.

Gas & Water Co. v. City, 57 Oh. St. 374, 380, 384.

If the electors can exercise this law-making power they have not done it in the case at bar.

Section 118½ attempts to illegally delegate the power of the electors to unknown persons.

If the electors can pass charter amendments, then the voters must themselves determine by a

definite amendment what they authorize and not give a mere indefinite and general power of attorney to unknown persons to do what they please so long as they build anything that may be called a bridge across the Willamette River at Broadway and make it 65 feet above high water and not less than 96.13 feet above the city datum or low water mark across the Willamette River, and do not spend more than the proceeds of \$2,000,000 30-year 4 per cent bonds.

Read the Section 118½ printed above, pages—, and you will see that the voters did not authorize anything, but undertook to illegally delegate their power. The voters did not have any opportunity to decide upon and authorize the height, width, material, plan or cost of said proposed bridge, nor where said proposed bridge shall extend and end, but all the vital and material parts of an authorization of a proposed bridge is attempted to be delegated by said Section 118½ to the decision of unknown persons, to be selected after the election, and the decision to be made after the election instead of being passed upon and decided by the voters at the election.

Stern v. Fargo, 122 N. W. R. 403.

Smith v. Mayor, 113 Ga. 833, 837, 838.

State v. Scales, 97 Pac. Rep. 587.

Elliott v. City, 121 Mich. 611.

Even if the "Oregon system" be constitutional, plaintiff in error is being deprived of his property

without due process of law when the Section 118 $\frac{1}{2}$ attempted to be passed and enforced is a mere indefinite delegation of power of attorney instead of a definite statute.

Plaintiff in error ought to be able to get the courts to require that there be some orderly, definite charter amendment passed by the voters before these powers of taxation and issuance of bonds and building bridges can be carried on at the expense of the taxpayers of Portland.

Due process of law ought to require definite, orderly action by some ascertainable person or set of persons. Who is it that is deciding what bridge shall be built, its cost, its usefulness, etc., etc.

United States v. Gremane, 31 U. S. Sup. Ct. Rep. 480.

What is the effect upon this case, upon this writ of error of the following act of the Legislature of Oregon?

After plaintiff in error had obtained this writ of error the defendants, because they were conscious that the contentions of plaintiff in error were correct and the decisions obtained against him erroneous, induced the Legislature of Oregon to pass the following act:

General Laws of Oregon, 1911, Chapter 6.

AN ACT

“To authorize the construction of a bridge known as the Broadway bridge, to be built across the Willamette river in the City of Portland, in the

State of Oregon, and to cure any errors or irregularities in the passage of the amendment to the charter of the City of Portland authorizing such bridge, and to validate and confirm the bonds issued or to be issued for the construction therefor.

Whereas, on June 7, 1909, the electors of the City of Portland, County of Multnomah, State of Oregon, passed an amendment to the charter of said city in pursuance of Article IV, Section 1 and Section 1A, and Article XI, Section 2, of the Constitution of the State of Oregon, authorizing the Council of the City of Portland, in the name of and under the corporate seal of said city, to issue and dispose of bonds of said city to an amount not exceeding \$2,000,000, to be known as the "bridge bonds of the City of Portland, series of 1909," for the purpose of constructing and building a bridge, known as the Broadway bridge, with appropriate approaches and terminals, and with a clearance of not less than 65 feet above high water mark and not less than 96.13 feet above low water mark, across the Willamette river in said city, from Broadway street at or near its intersection with Larrabee street, on the east side of said river, and following the line of Broadway street, extended westerly in its present course, to a point at or near its intersection with Seventh street, on the west side of said Willamette river, thence southerly and easterly to a point at or near the intersection of Sixth and Irving streets; with power to condemn or purchase

proper pier sites and other property necessary for the construction of said bridge; and

Whereas, the Council of the City of Portland has heretofore passed an ordinance authorizing the issuance and sale of bonds in pursuance of such amendment; and

Whereas, \$250,000 of said bonds has already been sold and disposed of; and

Whereas, a portion of the property has already been purchased for the location of piers and for the construction of said bridge, and a further issue of \$500,000 of bonds has been authorized and attempted sale made thereof; and

Whereas, certain suits have been commenced involving the power and authority of said City of Portland to construct said bridge and to issue bonds for the payment thereof, to-wit: Frank Kiernan v. The City of Portland (first suit), now pending on a motion for a rehearing in the Supreme Court after a decision in favor of said city; Frank Kiernan v. The City of Portland (second suit), pending in the Circuit Court of Multnomah County, State of Oregon, involving the same questions as the first suit; Frank Kiernan v. City of Portland, now pending in the United States Circuit Court for the District of Oregon, involving the same questions as said prior suits; and the Port of Portland v. The City of Portland, now pending in the Circuit Court of Multnomah County, State of Oregon, involving similar questions. All of said suits raise questions as to the power and authority of the City of Portland to construct said bridge and to issue bonds therefor

without an act of the Legislature of the State of Oregon authorizing, empowering and consenting to the construction thereof and to the issuance of bonds for that purpose; and

Whereas, on account of said suits and on account of the questions as to the authority to construct said bridge and to issue bonds therefor without an act of the Legislature, said \$500,000 of bonds offered for sale were rejected; and

Whereas, the doubt as to the authority of the city to build said bridge and issue bonds therefor without an act of Legislature has depreciated the value of said bonds; and

Whereas, the immediate construction of said bridge is an absolute necessity to the convenience, welfare and comfort of said city to meet the growth thereof,

Now, therefore, in order that all questions as to the authority of said city to construct said bridge and issue bonds may be set at rest,

Be it enacted by the People of the State of Oregon:

Be it enacted by the Legislative Assembly of the

State of Oregon:

Section 1. That the City of Portland is hereby fully authorized and empowered to construct and build said Broadway bridge, with appropriate approaches and terminals, and with a clearance of not less than 65 feet above high water mark and not less than 96.13 feet above the city datum or low water mark, across the Willamette, a navigable river in said city, substantially as follows, to-wit:

From Broadway street at or near its intersection with Larrabee street, on the east side of said river, and following the line of Broadway street, extending westerly in its present course, to a point at or near its intersection with Seventh street, on the west side of said Willamette river, thence southerly and easterly to a point at or near the intersection of Sixth and Irving streets in said city.

Section 2. The action of the electors of the City of Portland in the passage of said amendment to the charter, and the action of the Council of said city and of its Executive Board in constructing said bridge and purchasing and condemning property therefor, and in the sale of said bonds and in all further sale of bonds and in all acts performed or to be performed by the electors of said City of Portland and the Council of said city and its Executive Board towards, or in the aid of the construction of said bridge, are hereby fully authorized, ratified and confirmed.

Section 3. Any lack of authority and any illegality and any and all errors and irregularities in the passage of said amendment to the charter of said city, which amendment is known as Section 118 $\frac{1}{2}$ of said charter, and any lack of authority and any illegality and any and all errors and irregularities in the issuance of said bonds and all bonds heretofore and hereafter issued for the purpose of securing funds for the building and construction of said bridge and in the purchase and acquisition of property for the location of piers and construction

of said bridge are hereby cured and validated; and the issue and sale of and all such bonds, both before and after the passage of this act, and the purchase and acquisition of property for the location of piers for and the construction of said bridge and the construction and building of said bridge are hereby fully authorized and ratified and confirmed.

Section 4. Inasmuch as the construction of the Broadway bridge is a public necessity, it is hereby adjudged and declared that the status of affairs is such that this act is necessary for the immediate preservation of the public peace, health and safety, and excepted from the operation of the exercise of the referendum, an emergency is hereby declared to exist, and this act shall take effect and be in full force and effect from and after its approval by the Governor.

Filed in the office of the Secretary of State January 18, 1911."

Plaintiff in error submits that said act of the Legislature can not be considered in the determination of this case upon writ of error until the Supreme Court of the United States decides that the initiative and referendum amendments to the Constitution of Oregon and said Section 118 $\frac{1}{2}$ of the charter of Portland are invalid and that this case was erroneously decided in the state courts and should be reversed.

If the initiative and referendum amendments to the Constitution of Oregon and said Section 118 $\frac{1}{2}$ of the charter of Portland are valid and this case

was correctly decided by the state courts, then it is manifest that this case will be affirmed and the Legislature had no power to pass said act, as the said act is in conflict with said initiative and referendum amendments to the Constitution of Oregon. The act is a special act attempting to enlarge the charter powers of the City of Portland, and void.

Kiernan v. Portland, 112 Pac. Rep. 402.

State ex rel v. Swigert, 116 Pac. Rep. 440.

The defendants in error can not take inconsistent positions in this litigation. The defendants in error can not claim both ways at the same time.

Railway v. McCarthy, 96 U. S. 258, 268.

Bigelow on Estoppel (5th Ed.), 717 and on.

Newell v. Meyendorf, 9 Mont. 263; s. c. 8 L.

R. A. 440, 442.

La Follette v. Mitchell, 42 Or. 463.

Wyat v. Henderson, 31 Or. 48 on 54-56.

Dunning v. Waltz, 42 Or. 109.

Anderson v. P. F. Co., 37 Or. 483.

Matter v. Hosmer, 37 Or. 523.

Christenson v. Nelson, 38 Or. 473.

L. M. Inv. Co. v. Garbade, 41 Or. 123, 133.

Oregon v. Davis, 42 Or. 34.

The right of plaintiff in error to a decision on the merits can not be destroyed by the acts of the defendants.

Livesley v. Johnston, 45 Or. 30.

Assuming that the Supreme Court of the United States will rule in favor of plaintiff in error and hold that the initiative and referendum amendments and said Section 118½ of the charter are invalid, what will be the effect of said act of the Legislature of Oregon?

If the Constitution of Oregon had no initiative and referendum amendments, then the Legislature of Oregon by a suitable act could enact that the City of Portland build this bridge across the Willamette river and issue bonds and levy taxes therefor, provided the consent of Congress was obtained to the building of the bridge, and now the consent of Congress has been obtained by a valid act to the building of the bridge.

If the Constitution of Oregon had no initiative and referendum amendments, then the Legislature of Oregon, by a suitable act, could enact retrospectively what it could enact prospectively.

The question then arises what does said act of the Legislature enact?

Said act of the Legislature only enacts what is stated in Section 1 thereof, to-wit:

"Section 1. That the City of Portland is hereby fully authorized and empowered to construct and build said Broadway bridge with appropriate approaches and terminals, and with a clearance of not less than 65 feet above high water mark and not less than 96.13 feet above the city datum or low water mark, across the Willamette, a navigable river in said city, substantially as follows, to-wit: From Broadway street at or near its intersection with Larrabee street on the east side of said river, and

following the line of Broadway street extended westerly in its present course, to a point at or near its intersection with Seventh street on the west side of said Willamette river, thence southerly and easterly to a point at or near its intersection with Sixth and Irving streets in said city."

By Sections 2 and 3 of said act the Legislature does not enact anything. It attempts to authorize, ratify and confirm the action of the electors of the City of Portland in the passage of said amendment to the charter, which the electors had no right to pass.

The Legislature can not authorize the electors of Portland to pass charter amendments.

The Legislature must pass charter amendments itself.

By Sections 2 and 3 the Legislature attempted to draw a power of attorney whereby it authorized the electors of Portland to pass a law in the place of and instead of the Legislature itself passing the law and ratifying and confirming what the electors had done or might do by virtue of their agency.

That the Legislature can not delegate its law-making power to electors or anyone else, by statute, resolution, power of attorney, or any other way, has been decided frequently.

By said act the Legislature did not enact that the City of Portland had authority in its charter to issue bonds and levy taxes, and raise money to build a bridge.

The charter of Portland must be passed and enacted by the Legislature; not by the electors.

A municipality can not create its own charter powers; the charter powers must be created by the Legislature, and the city act under its charter.

Elliot v. The City, 121 Mich. 611.

State v. Scalas, 97 Pac. Rep. 587.

State v. Haines, 35 Or. 379 on 381.

1 *Dillon Mun. Corporations* (5th Ed.), Sections 33, 61, 62, 63, 69.

Before the City of Portland can issue bonds, levy taxes and build bridges it must be authorized to do so by its charter passed by the Legislature.

The powers of municipal corporations are limited to the powers granted in their charter.

Pac. University v. Johnson, 47 Or. 448.

McDonald v. Lane, 49 Or. 530, 532.

Naylor v. McColloch, 54 Or. 305, 308.

City of Corvallis v. Carlisle, 10 Or. 139.

Beers v. Dalles City, 16 Or. 334.

State v. Simon, 20 Or. 365.

1 *Dillon Mun. Corp.* (5th Ed.), Section 33.

Municipalities can not issue bonds unless the power to do so is conferred by legislative authority, express or implied, and that any doubt as to the existence of such power ought to be resolved against its existence.

Benham v. Bank, 144 U. S. 173.

Klamath Falls v. Sachs, 35 Or. 325.

28 Cyc. 1575.

21 Ency. Law (2d Ed.), 45, 70.

The preamble of the act of the Legislature is not any part of the enactment.

The reference in the act to the amendment known as Section 118 $\frac{1}{2}$ does not enact the statements made in the document known as Section 118 $\frac{1}{2}$ into a charter passed by the Legislature of the State of Oregon.

In order for the Legislature to enact into the charter what is set forth in said document, Section 118 $\frac{1}{2}$, the Legislature in an act duly passed by it must itself enact what it wishes to enact. It must do what it did in Section 1 of said act.

By Section 1 of said act the Legislature enacts something.

By Sections 2 and 3 the Legislature does not enact anything.

If the Legislature desires to authorize the issuance of any amount of bonds by the City of Portland it must state what it wishes to enact and enact it for itself in the statute.

The intention of the Legislature must be ascertained from the words used by it in the statute in connection with the surrounding circumstances.

State v. Simon, 20 Or. 365 on 370, 372, 373.

State v. Smith (Or.), 107 Pac. R. on 983.

Hobbs v. McLean, 117 U. S. 567 on 579.

A comparison between said proposed Section 118½, and what it attempts to provide for and Section 1 of said act of the Legislature shows that the act of the Legislature only enacts a very small part of said proposed Section 118½.

The most important parts of said proposed Section 118½ have not been enacted by the Legislature.

Therefore, the act of the Legislature is insufficient in any view to cause an affirmance of this case. It is a mere indefinite attempt to delegate its legislative power to enact charters for municipalities and is invalid. The act passes the limit of the power of the Legislature, which is that it must not delegate its function as the law-making branch of the government.

Maguire v. District of Columbia, 56 L. R. A. 430.

State v. Ashbrook, 48 L. R. A. 265.

Knight v. Trigg (Idaho), 100 Pac. R. 1060.

This is a case similar to State v. Simon, 20 Or. on 373, where the Legislature has omitted by mistake or otherwise to make the necessary provisions to carry out its intention, and the court can not by construction supply the omissions.

Courts can not supply omissions in legislation, nor afford relief because they are supposed to exist.

Hobbs v. McLean, 117 U. S. 567 on 579.

CONCLUSION.

Plaintiff in error wishes in conclusion to suggest that a decision of this Court that the initiative and referendum can be adopted by the State of Oregon will put said initiative and referendum negatively in effect in every state of this Union.

That is, it will establish that such a system of government is constitutional. Then it will be in the power of the voters in each state to adopt the Oregon initiative and referendum amendment.

Whether any state adopts the Oregon initiative and referendum amendment or not, will have to be decided by the separate states in the manner provided in their state constitutions for amendments.

Whether state constitutions will be amended or not will be determined by the voters of each state.

Plaintiff in error urges that there is an exceedingly important constitutional question to be determined in this case, and respectfully asks its careful consideration in this case to the end that this constitutional question will be wisely determined for the benefit of the entire nation.

It is respectfully submitted that the judgment should be reversed.

RALPH R. DUNIWAY,
Attorney for Plaintiff in Error.

T. J. GEISLER,
of Counsel.

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CARD 4

IN THE
Supreme Court
OF THE
United States

OCTOBER TERM, 1910

No. 896

FRANK KIERNAN,

Plaintiff in Error,

vs.

THE CITY OF PORTLAND, a Municipal
Corporation, JOSEPH SIMON, Mayor of
City of Portland, A. L. BARBUR, Audi-
tor of the City of Portland, and JOSEPH
BUCHTEL,

Defendants in Error.

Brief of Defendants in Error

STATEMENT OF FACTS

On June 2, 1902, there was adopted in the State of Oregon a system of legislation known as the Initiative and Referendum. Such adoption was by an amendment to the State Constitution reserving to the people of the state the right to initiate legis-

lation and have it voted upon by the people, and the right to refer laws, passed by the legislature, to the people for ratification or rejection. Such amendment reads as follows:

"The legislative authority of the State shall be vested in a Legislative Assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislative Assembly, and also reserve power at their own option to approve or reject at the polls any act of the Legislative Assembly. The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public health, peace or safety), either by the petition signed by five per cent of the legal voters, or by the Legislative Assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the Legislative Assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: "Be it

enacted by the people of the State of Oregon." This section shall not be construed to deprive any member of the Legislative Assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor."

On June 4, 1906, the initiative and referendum powers which had been reserved to the people of the state by the amendment of June 2, 1902, were further reserved "as to all local, special and municipal legislation," to the people of the municipalities of the state. This reservation was adopted by amendment to the State Constitution known as Article IV, Section 1a. There was also adopted on June 4, 1906, an amendment to the State Constitution known as Article XI, Section 2. This last amendment prohibited the Legislative Assembly from amending or repealing the charter of any municipality of the state, and the power to amend municipal charters, subject to the constitution and criminal laws of the state, was reserved to the people of the municipalities. Said amendments read as follows:

"Section 1a. The referendum may be demanded by the people against one or more items, sections or parts of any act of the Legislative Assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay

the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum nor more than fifteen per cent. to propose any measure by the initiative, in any city or town."

Article XI, Section 2. Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation of any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon.

By a law of the legislature, (Laws 1907 Chapter 226), a method was provided for carrying into effect such amendments. Such law also provided that the municipality might provide by ordinance for the carrying into effect of the initiative and referendum powers reserved to the municipality. The City of Portland by the enactment of the "McNary Ordinance" (Ordinance No. 16311), provided a method for the carrying into effect of the initiative and referendum powers of the City.

Thereafter on June 7, 1909, at a regular election the legal voters of the City of Portland passed an amendment to their

charter, known as Section 118½, authorizing and providing for the building of a bridge hereinafter designated as the Broadway Bridge, across the Willamette River within the city and authorizing and providing for the issuing of \$2,000,000 of bonds of said City for that purpose. Said amendment reads as follows:

AN ACT

"To amend Article VI of Chapter III of the Charter of the City of Portland, entitled "An Act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the Secretary of State, January 23, 1903, by inserting a section in said Article VI of Chapter III after Section 118 and before Section 119 thereof, which shall be designated in the charter as Section One Hundred Eighteen and One-half (118½) of Article VI of Chapter III.

Be it enacted by the People of the City of Portland and the City of Portland does ordain as follows:

Section 1. That Article VI of Chapter III of the Charter of the City of Portland, entitled "An Act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith," filed in the office of the Secretary of State, January 23, 1903, be and the same is hereby amended by inserting the following section in said Article VI of Chapter III, after Section 118 and before Section 119 thereof, which shall be designated in the charter as Section One Hundred and Eighteen and One-half (118½) of Article VI of Chapter III.

Section 118½. The Council of the City of Portland is hereby authorized in the name of and under the corporate seal of said City to issue and dispose of bonds of said City of Portland to an amount not exceeding two million dollars of the denominations of five hundred dollars, or one thousand dollars, as the Council may determine, and in such form as the Council shall select, with interest coupons attached thereto. The said bonds shall be signed by the Mayor and countersigned by the Auditor of said City of Portland, and each of said coupons shall have the signatures of the Mayor and Auditor of the City of Portland engraved thereon, whereby the City of Portland shall be held and considered in substance and effect to undertake and promise, in consideration of the premises, to pay to the bearer of each of said bonds, at the expiration of thirty years from the date thereof, the sum named therein in gold coin of the United States, together with interest thereon in like gold coin at the rate of four per centum per annum, payable half yearly as provided in said coupons. The bonds issued in pursuance of the authority hereby granted shall be known as the "Bridge Bonds of the City of Portland, Series 1909." The bonds herein provided for and authorized to be issued shall be advertised and sold to the highest responsible bidder. The Council may, at its discretion, reject any and all bids tendered for such bonds and proceed to re-advertise the same when the bids are not satisfactory. The Treasurer of the City of Portland, Oregon, shall have the care and custody of all moneys received from the sale of said bonds, or otherwise, and shall pay out the same on warrants of the Mayor countersigned by the Auditor and not otherwise. All expenses connected with the purchase or condemnation of any property, easement, franchise, or rights, and the expense of the bonds issued as herein authorized, and the cost of the bridge herein provided for, with its approaches, terminals and

necessary accessories, are to be paid out of the proceeds of the sale of said bonds.

From the fund herein provided for, the Executive Board of the City of Portland, Multnomah County, State of Oregon, and its successors in office, is hereby authorized and empowered, in the name of the City of Portland, to construct and build a bridge with appropriate approaches and terminals, and with a clearance of not less than 65 feet above high water and not less than 96.13 feet above the city datum or low water mark, across the Willamette River in said City, from Broadway street at or near its intersection with Larrabee street, on the east side of said river, and following the line of Broadway street, extended westerly in its present course, to a point at or near its intersection with Seventh Street on the west side of said Willamette River; thence southerly and easterly to a point at or near the intersection of Sixth and Irving streets; and it shall have full power and authority, subject to such regulations as may be imposed by the United States, to build, erect and construct piers, abutments and other necessary supports in the bed of the Willamette River for the foundation of such bridge.

The location of the west approach and incline of said bridge shall be subject, however, to such modification and change as may be deemed expedient by said Executive Board or its successors in office.

The said Executive Board, or its successors in office, for the purpose of carrying into effect the provisions of this section, is hereby authorized and empowered to appropriate and condemn in the name of the City of Portland, for the public use, any property occupied by or abutting upon said streets, bridge, site, approaches, or terminals, or necessary or which may be required, for the construction or maintenance of said bridge, approaches or terminals, including all franchises, easements, liens,

approaches, structures, superstructures, leases, railroad tracks and railroad property, railway wires, rights of way, roadways, telephone, telegraph and electric light wires, which said Executive Board, or its successors may require to carry into effect the purposes of this section, and such property may be entered upon and examined, surveyed, selected, condemned and appropriated in the mode provided by the Charter of the City of Portland or by the statutes of the State of Oregon, for the appropriation of property for public use or corporate purposes. And for the purpose of carrying the provisions of this section into effect, the Executive Board of the City of Portland, or its successors in office, is authorized and empowered to appropriate and use the whole or any part of any of the public streets or highways of the City of Portland or to establish or alter the grades thereof. All railway tracks laid upon said bridge, or upon its approaches or terminals, shall forever be and remain the exclusive property of the City of Portland, and no exclusive privilege or franchise shall be granted to any person, railway company, or other public service corporation, for the use of the whole or any part of such bridge, approaches or terminals. And all of such privileges or franchises that may be granted by the City of Portland for the use of the whole or any part of such bridge, approaches or terminals, shall be granted upon such compensation to the City as may be determined by the Council of the City of Portland or its successors in office. After the construction of such bridge, the Executive Board, or its successors in office shall render and deliver the possession of the same to the County Court of Multnomah County, State of Oregon, and such Court shall operate, control and manage the same and keep the same in repair in the same manner as other bridges crossing the Willamette River within the City of Portland are operated, controlled and managed as required by law.

All acts and parts of acts in conflict herewith are hereby repealed to the extent that they may conflict with the provisions hereof."

About the 27th day of October, 1909, the Council of the City of Portland passed an ordinance authorizing the issue and sale of \$250,000 of said bonds, and proceeded to advertise for the sale of the same. Whereupon the plaintiff in error commenced the present suit in the Circuit Court of the State of Oregon, for the County of Multnomah, seeking, as a taxpayer, to enjoin the issue and sale of said bonds upon the ground, among others, that the amendment to the Charter of the City of Portland was void because the initiative and referendum amendments to the Constitution of the State of Oregon were void; which last amendments were claimed to be void because they conflicted with Section 4 of Article IV of the Constitution of the United States.

The Circuit Court of the County of Multnomah, State of Oregon, after a trial, refused to grant an injunction prohibiting the sale of the bonds and plaintiff in error appealed to the Supreme Court of the State of Oregon, and on October 31, 1910, that court affirmed the action of the lower court. A motion for rehearing was then filed by the plaintiff in error which motion was denied in a learned opinion by Judge King. Thereafter the plaintiff in error sued out a writ of error in this court, claiming that a federal question was involved.

CURATIVE ACTS

In order that there might be no question in regard to the right of the City to sell and dispose of said bonds, an act of the legislature of the State of Oregon was secured authorizing and confirming the action of the people of the City of Portland in the construction of said bridge, and the issuance of bonds to cover the cost thereof, a copy of which act of the legislature and the date of its passage is as follows:

General Laws of Oregon, 1911, Chap. 6.

AN ACT

"To authorize the construction of a bridge known as the Broadway Bridge, to be built across the Willamette River in the City of Portland in the State of Oregon and to cure any errors or irregularities in the passage of the amendment to the Charter of the City of Portland authorizing such bridge and to validate and confirm the bonds issued or to be issued for the construction thereof.

WHEREAS, on June 7, 1909, the electors of the City of Portland, County of Multnomah, State of Oregon, passed an amendment to the Charter of said city in pursuance of Article IV, Section 1, and Section 1a; and Article XI, Section 2 of the Constitution of the State of Oregon, authorizing the Council of the City of Portland in the name of and under the corporate seal of said city, to issue and dispose of bonds of said City to an amount not exceeding \$2,000,000 to be known as the "Bridge Bonds of the City of Portland, Series 1909," for the purpose of constructing and building a bridge, known as the Broadway Bridge, with appropriate approaches and terminals, and with a clearance of not less than 65 feet above high water mark and not less than 96.13 feet above low water mark, across the Willamette River in said City, from Broadway Street at or near its intersection with Larrabee Street, on the east side of said river, and following the line of Broadway Street, extended westerly in its present course, to a point at or near its intersection with Seventh Street on the west side of said Willamette River, thence southerly and easterly to a point at or near the intersection of Sixth and Irving Streets; with power to condemn or purchase proper pier sites and other property necessary for the construction of said bridge; and,

WHEREAS, the Council of the City of Portland has heretofore passed an ordinance authorizing the issuance

and sale of bonds in pursuance of such amendments; and,

WHEREAS, \$250,000 of said bonds have already been sold and disposed of; and,

WHEREAS, a portion of the property has already been purchased for the location of piers and for the construction of said bridge, and a further issue of \$500,000 of bonds has been authorized and attempted sale made thereof; and,

WHEREAS, certain suits have been commenced involving the power and authority of said City of Portland, to construct said bridge and to issue bonds for the payment thereof, to-wit: Frank Kiernan v. The City of Portland, (first suit), now pending on a motion for rehearing in the Supreme Court after a decision in favor of said City; Frank Kiernan vs. The City of Portland, (second suit), pending in the Circuit Court of Multnomah County, State of Oregon, involving the same questions as the first suit; Frank Kiernan vs. The City of Portland, now pending in the United States Circuit Court for the District of Oregon, involving the same questions as said prior suits; and the Port of Portland vs. The City of Portland, now pending in the Circuit Court of Multnomah County, State of Oregon, involving similar questions. All of said suits raise questions as to the power and authority of the City of Portland to construct said bridge and to issue bonds therefor without an act of the Legislature of the State of Oregon, authorizing, empowering and consenting to the construction thereof and to the issuance of bonds for that purpose; and,

WHEREAS, on account of said suits and on account of the questions as to the authority to construct said bridge and to issue bonds therefor without an act of the Legislature, said \$500,000 of bonds offered for sale were rejected; and,

WHEREAS, the doubt as to the authority of the city to build said bridge and issue bonds therefor without an act of the Legislature has depreciated the value of said bonds; and,

WHEREAS, the immediate construction of said bridge is an absolute necessity to the convenience, welfare and comfort of said City to meet the growth thereof.

NOW THEREFORE, in order that all questions as to the authority of said City to construct said bridge and issue bonds may be set at rest,

Be it enacted by the People of the State of Oregon:

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1. That the City of Portland is hereby fully authorized and empowered to construct and build said Broadway bridge with appropriate approaches and terminals, and with a clearance of not less than 65 feet above high water mark and not less than 96.13 feet above the city datum or low water mark, across the Willamette, a navigable river in said City, substantially as follows, to-wit: From Broadway Street at or near its intersection with Larrabee Street, on the east side of said river, and following the line of Broadway Street, extending westerly in its present course, to a point at or near its intersection with Seventh Street on the west side of said Willamette River, thence southerly and easterly to a point at or near the intersection of Sixth and Irving Streets in said City.

Section 2. The action of the electors of the City of Portland in the passage of said amendment to the Charter and the action of the Council of said City and of its Executive Board, in constructing said bridge and purchasing and condemning property therefor and in the sale of said bonds and in all further sale of bonds and in all acts performed or to be performed by the electors of said

City of Portland and the Council of said City and its Executive Board towards, or in the aid of the construction of said bridge, are hereby fully authorized, ratified and confirmed.

Section 3. Any lack of authority and any illegality and any and all errors and irregularities in the passage of said amendment to the Charter of said City, which amendment is known as Section 118½ of said Charter and any lack of authority and any illegality and any and all errors and irregularities in the issuance of said bonds and all bonds heretofore and hereafter issued for the purpose of securing funds for the building and construction of said bridge and in the purchase and acquisition of property for the location of piers and construction of said bridge are hereby cured and validated; and the issue and sale of any and all such bonds, both before and after the passage of this act, and the purchase and acquisition of property for the location of piers for and the construction of said bridge and the construction and building of said bridge are hereby fully authorized and ratified and confirmed.

Section 4. Inasmuch as the construction of the Broadway bridge is a public necessity, it is hereby adjudged and declared that the status of affairs is such that this act is necessary for the immediate preservation of the public health, and safety, and excepted from the operation of the exercise of the referendum, an emergency is hereby declared to exist, and this act shall take effect and be in full force and effect from and after its approval by the Governor.

Filed in the office of the Secretary of State January 18, 1911."

Also in order that objections made by the plaintiff in error in regard to the authority of the City to construct said bridge without the authorization of Congress of the United States,

an act was passed by Congress ratifying and authorizing the construction of said bridge, a copy of which act of Congress is as follows:

"AN ACT"

"To authorize construction of the Broadway Bridge across the Willamette River at Portland, Oregon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That the City of Portland, in the County of Multnomah, State of Oregon, is hereby fully authorized and empowered to construct and build a bridge to be known as the Broadway Bridge, with appropriate approaches and terminals with a clearance of not less than sixty-five feet above high water mark and not less than ninety-three and thirteen one-hundredths feet above low-water mark, city datum, across the Willamette, a navigable river, in said city, substantially as follows, to-wit: From Broadway Street at or near its intersection with Larrabee Street on the east side of said river, and following the line of Broadway Street, extended westerly in its present course to a point at or near its intersection with Seventh Street on the west side of said river; thence southerly and easterly to a point at or near the intersection of Sixth and Irving Streets in said city: Provided, That said bridge shall be constructed and maintained in accordance with the provisions of the Act entitled 'An Act to regulate the construction of bridges over navigable waters,' approved March twenty-third, nineteen hundred and six.

Section 2. That any irregularities in the passage of the amendment to the charter of said city known as section one hundred and eighteen and one-half and any errors or irregularities in the issuance of said bonds due to a lack of authority from Congress to build said bridge are hereby cured and the issue of said bonds, both before

the passage of this Act and afterwards, is hereby fully authorized, ratified and confirmed so far as a lack of authority from Congress to build such bridge is concerned.

Section 3. That the right to alter, amend or repeal this Act is hereby expressly reserved."

A FURTHER HISTORY

A history of plaintiff in error's further action in regard to matters in dispute is here given. Several other suits were commenced by Kiernan against the city involving substantially the same issues as were raised in the first suit, as follows:

On October 21, 1910, plaintiff in error and his attorney, R. R. Duniway, who appeared for him in the first suit, commenced a second suit, hereafter designated as the "second suit" and filed a complaint therein making the City of Portland a party, together with its Mayor and Auditor and also making the bank of Ladd & Tilton a party, which said second suit involved substantially the same issues as were raised in the first suit, being different only in the fact that it made Ladd & Tilton a party, and set forth the sale of a certain \$250,000 issue of said bonds to Ladd & Tilton Bank, the issue of which said Kiernan had attempted to enjoin in the first suit.

An application was made to Judge Morrow, a Circuit Judge of said Multnomah County, for an injunction in said second suit and upon argument of such application the same was denied. Whereupon a demurrer was interposed by defendants to said complaint which was, on the 31st day of January, 1911, sustained by Judge McGinn, another Judge of the Circuit Court for Multnomah County. An application was then made and filed for a supplemental complaint in said second suit,

which after hearing was also denied by Judge McGinn. Afterwards an appeal was taken to the Supreme Court of the State of Oregon, which said appeal is now pending in that Court.

On October 22, 1910, a third suit, by the Port of Portland against the City of Portland, was commenced involving substantially the same questions involved in the first and second suits, but more especially directed to the authority of the City of Portland to build a bridge without the consent of said Port of Portland. While the plaintiff in error does not appear as a party in this third suit and while the attorney for the Port of Portland is not said R. R. Duniway, plaintiff in error's attorney, nevertheless, the same issues were substantially set forth in said third suit. And all of which said issues were fully determined by the Supreme Court of Oregon in this suit.

On or about November 7, 1910, plaintiff in error commenced a suit in the Circuit Court of the United States for the district of Oregon against the same defendants as hereinabove designated and the Ladd & Tilton Bank, which said suit is herein designated as the "fourth suit." This suit set out substantially the same questions that were raised in the first and second suits but were more directed to the questions involving the constitutionality of the amendments to the Constitution of Oregon, known as the Initiative and Referendum Amendments. Thereafter a demurrer was interposed by defendants in error to said complaint which demurrer was sustained by Judge Bean of said United States Circuit Court, and the suit of plaintiff dismissed. No other proceedings have been had in said fourth suit.

On the 17th day of February, 1910, said R. R. Duniway, purporting to act for one W. F. Burrell, commenced a fifth

suit against defendants in error and certain other parties attacking the authority of the City to build said bridge and to enter into a contract for that purpose. A demurrer was interposed to said fifth suit by defendant in error which was sustained by the Circuit Court of Multnomah County and an appeal was taken by W. F. Burrell to the Supreme Court of the State of Oregon where said suit is now pending.

Thereafter and on or about the 25th day of April, 1911, the City of Portland, defendant in error, commenced a suit and obtained an injunction against plaintiff in error enjoining him from commencing other or further suits which he threatened to do, involving the same questions alleged in the then pending suits. An injunction was granted to defendants in error on the ground that the commencing of any or further suits was vexatious litigation and not prosecuted in good faith.

LETTERS AND TELEGRAMS

Plaintiff in error in addition to commencing the suits above set forth, by and through his attorney, R. R. Duniway, wrote numerous letters and telegrams to financial concerns in the East who were contemplating the purchase of said bonds making false statements in regard to the litigation that plaintiff in error was prosecuting and in regard to the credit of the city, which letters and telegrams are as follows:

"Boston, Oct. 6, 1910.

Shawmut Bank:

No bridge ever built across Willamette without franchise from state which Portland has not got for Broadway bridge. Port of Portland has granted no franchise. No bonds ever sold under this alleged charter section.

(Signed) RALPH R. DUNIWAY,
Attorney for Frank Kiernan,
Portland."

case merits refused to continue temporary injunction because court holds your bid for bonds is subject to the decision of Supreme Court in Kiernan case and purchaser buys at his peril is not innocent purchase and that lis pendens applies to these bonds and that Kiernan does not need injunction started new suit against City and Ladd and Tilton Bank today.

RALPH R. DUNIWAY,
Atty for Frank Kiernan."

"Ralph R. Duniway.

Portland, Ore. Jan. 12, 1911.

R. L. Day & Co.:

35 Congress St., Boston, Mass.

Gentlemen:

The City of Portland is advertising for bids on \$500,000 Broadway Bridge Bonds to be opened January 24, 1911. You may be interested in knowing that Mr. Frank Kiernan, a taxpayer of the City of Portland, is contesting the legality of said bonds, and on January 10, 1911, obtained a Writ of Error from the United States Supreme Court to the State Supreme Court of Oregon dismissing his suit. The Supreme Court of Oregon had previously announced an opinion that the bonds would be purchased subject to, and with notice of, this litigation. Also Mr. Kiernan has a suit pending against the City of Portland and the purchaser of the first \$250,000 of these bonds, in the Circuit Court of the State of Oregon for the County of Multnomah; also a suit against said parties in the United States Circuit Court for the District of Oregon.

On November 7, 1910, E. H. Rollins & Sons, N. W. Halsey & Co., and A. B. Leach & Co., jointly submitted the highest bid for these \$500,000 of bonds and submitted the proceedings to Mr. Charles B. Wood, an attorney of Chicago, for examination, and on December 6, 1910, Mr.

Wood submitted to them a written opinion, declining to approve the bonds, and re-advertising these same bonds, to be sold again on January 24, 1911. I enclose you a copy of Mr. Wood's opinion, showing the illegality of these bonds, on file with the City Auditor of the City of Portland.

I call your attention to the fact that in the first objection raised by Mr. Wood, he states that it was not raised in the case of *Kiernan vs. The City of Portland*, 111 Pac. Rep. 379, and has not been adjudicated by the Courts of Oregon. I understand from the newspapers that the City Auditor has sent out statements, that the Supreme Court of Oregon has decided the question the other way. The City Auditor is in error in making any such statement.

I also call your attention to the fact that at the election of November 8, 1910, the voters of the State of Oregon adopted a tax amendment, which is worthy of careful study by all persons before bidding on bonds in Oregon, which tax amendment reads as follows:

ARTICLE IX.

'Section 1-a. No poll or head tax shall be levied or collected in Oregon; no bill regulating taxation or exemption throughout the State shall become a law until approved by the people of the State at a regular general election; none of the restrictions of the Constitution shall apply to measures approved by the people declaring what shall be subject to taxation or exemption and how it shall be taxed or exempted whether proposed by the Legislative Assembly or by initiative petition; but the people of the several counties are hereby empowered and authorized to regulate taxation and exemption within their several counties, subject to any general law which may hereafter be enacted.'

The validity of this tax amendment and what it means

have not yet been adjudicated in the Courts of Oregon. How will it affect the collection of bonds?

This letter is sent to you to give you the information herein contained, to consider in determining whether you wish to submit a bid for these bonds or not, and to give you notice of the actual condition of these bonds, so that you will bid with full notice of the litigation pending against these bonds.

Yours truly,
(Signed) RALPH R. DUNIWAY,
Attorney for Frank Kiernan."

On April 15, 1911, the plaintiff in error acting by and through his attorney, R. R. Duniway, sent the telegrams to Messrs. Story, Thorndyke, Palmer & Dodge, attorneys at law of Boston, Massachusetts, in substance as follows:

"Hawkins, Delefield and Longfellow, attorneys of New York, gave Farson & Co. unfavorable opinion on Broadway Bridge bonds. Farson has brought suit in the Federal Court here to recover his \$25,000 deposit from the City. Charles B. Wood, attorney, Chicago, gave E. H. Rollings & Sons opinion Broadway Bridge bonds illegal on question not yet raised in any court. Kiernan has appealed to Oregon Supreme Court suit to require Ladd & Tilton Bank to return \$250,000.00 Broadway Bridge bonds to City or pay face and interest of bonds; also raises question whether bonds can be sold at a discount and raise rate of interest. This case was decided bad on demurrer when court held complaint good on demurrer before. Kiernan has obtained writ of error and docketed his first case in United States Supreme Court. Expect to sue Shawmut National Bank in Federal Court next week for taxpayer on last bid and raise all question possible in litigation. Am mailing you letter and enclosures

so that you will learn what litigation is pending against Broadway Bridge Bonds."

That notwithstanding such letters and telegrams and plaintiff's vexatious litigation, the City of Portland disposed of \$1,350,000 of the bonds. The money received therefor has and is being invested in the purchase of the landings, building of the piers and approaches and the superstructure of the bridge. The construction of the bridge is at the present time far advanced.

By reason of said suits and said letters, telegrams and statements sent out by plaintiff in error, bond buyers were deterred from bidding upon said bonds and they were sold below their par value to-wit, at the sum of \$93.08 for \$250,000 and the sum of 91.399 for the \$500,000 and at 93.669 for \$600,000. The depreciation of said bonds below par was due, largely, if not entirely, to the vexatious litigation of plaintiff and his letters, telegrams, statements and advertisements.

NECESSITY OF IMMEDIATE CONSTRUCTION

That the immediate construction of the bridge is necessary for the reason that the last new bridge constructed across the Willamette River was constructed about the year 1893 when the population upon the east side of the river, which is largely the residence portion of the city, was about one-tenth of its present population and all the bridges at the present time are greatly congested and are totally inadequate to meet the demands of the public in crossing said river. The necessity for the immediate construction of the bridge is shown by affidavits of divers persons familiar with the circumstances, filed in this court in support of the motion to advance this hearing.

POINTS AND AUTHORITIES

The people have the power of local self government.

Art. I, Sec. 1, Constitution of Oregon.
10th Amendment Const. of United States.
Cooley on Const. Lim. (7th Ed.) pp. 68-69.

The federal government is the only party who can question the construction of a bridge over navigable water on account of a lack of federal authority. None can question the lack of legislative authority to construct a bridge across navigable waters, except the state.

Cudinger vs. City of Saginaw, 132 Mich. 395; 405.
Portland vs. Montgomery, 38 Ore. 215; 222.
190 U. S. (Same case) 89.
Esanaba Co. vs. Chicago, 107 U. S. 678; 689.
Fort Plain Bridge Co. vs. Smith, 30 N. Y. 44.
Rowe vs. Strong, 107 N. Y. 350; 360.
Doolittle vs. Supervisors of Broome Co., 18 N. Y. 155.

Article IV. Section 1, and Section 1-a do not violate the Federal Constitution.

Kiernan vs. City of Portland, 111 Pac. (Ore.) 379; Re-hearing 112 Pac. 402.
Straw vs. Harris, 54 Ore. 424; 430-431.
Bonner vs. Belsterling, 137 S. W. 1155.
Walker vs. Spokane, 113 Pac. (Wash.) 775.
Kadderly vs. Portland, 44 Ore. 118; 144-145.
Hartig vs. City of Seattle, 102 Pac. (Wash.) 408; 409.
In Re Pfahler (Calif.) 88 Pac. 270; 272.
Kiernan vs. Portland et al., — Fed. —.

Whether or not a state government is republican in form is a political question.

- Luther vs. Borden, 7 How. (U. S.) 1, 42.
 Texas vs. White, 7 Wall. (U. S.) 700; 730.
 Taylor and Marshall vs. Beckham, 178 U. S. 548.
 Hopkins vs. City of Duluth, 81 Minn. 189.
 In Re Duncan, 139 U. S. 449.
 Leeper vs. State of Texas, 139 U. S. 462; 467.
 McConaughey vs. State, 106 Minn. 392.
 Brickbome vs. Brooks, 165 Fed. 534.

The Oregon initiative and referendum amendments as to municipalities are valid.

- Constitution of Oregon Art. IV. Sec. 1-a; Art. XI. Sec. 2.
 Kiernan vs. City of Portland, 111 Pac. (Ore.) 379; Re-hearing 112 Pac. 402.
 Kiernan vs. Portland et al., ——— Fed. ———.
 Straw vs. Harris, 54 Ore. 424; 430-431.
 Walker vs. City of Spokane, 113 Pac. (Wash.) 775.
 City of McMinnville vs. Howenstine, 109 Pac. 81.
 In Re Pfahler (Calif.) 88 Pac. 270; 272.
 St. Louis vs. N. W. T. Co., 149 U. S. 465.

Definitions of the word, republic.

- The Century Dictionary.
 Rapalje & Lawrence's Law Dictionary.
 2 Bouvier Law Dictionary, 577.
 20th Century Encyclopedia and Dictionary.
 Encyclopedia Americana (Ed. 1903-04).
 34 Cyc. pp. 16-22.
 24 Amr. & Eng. Enc. of Law, 598.
 Chisholm vs. Georgia, 2 Dallas (U. S.) 419.

The meaning of the word republic as defined in the federal debates at the time of adoption of the United States Constitution.

Federalist 302.

Federalist papers No. 39 and 43.
 5 Elliots Debates, 160.
 3 Elliots Debates, 34; 322.
 Madison in The Federalist.

Principles and meaning of a republican form of government.

Cooley on Const. Lim. (7th Ed.) pp. 3; 6; 9; 45; 65-69.
 United States Constitution 10th Amendment.
 Chisholm vs. Georgia, 2 Dallas (U. S.) 419.
 Trustees of Saratoga Springs vs. Saratoga Gas E. L. &
 P. Co., 191 N. Y. 123; 18 L. R. A. (N. S.) 718.
 Kadderly vs. Portland, 44 Ore. 118; 144-145.
 Walker vs. City of Spokane, 113 Pac. (Wash.) 775.
 Hopkins vs. City of Duluth, 81 Minn. 189.
 Oregon vs. Pac. States Tel. & Tel. Co. 53 Ore. 162; 166.
 Straw vs. Harris, 54 Ore. 424; 430-431.
 Ex Parte Wagner, 95 Pac. (Okl.) 435.
 Hartig vs. City of Seattle, 102 Pac. (Wash.) 408; 409.
 In Re Pfahler (Calif.) 88 Pac. 270; 272.

ARGUMENT

HISTORY OF DIRECT LEGISLATION IN OREGON.

For many years the state of Oregon on account of its location and lack of railroad facilities, was isolated from the political and business activities of older communities. The people were energetic and industrious and paid little attention to political matters. For which reason public officers and representative bodies became indifferent to the welfare of the people of the State and, in many instances, even corrupt. Flagrant frauds were committed in matters political. Public servants were unfaithful. Bad laws were enacted while good laws were denied. A United States senator was convicted and sentenced to the penitentiary. A congressman indicted. Many

public men were involved in the Oregon Land Frauds. The legislature met but never organized because of a contest over the United States Senatorship. Thus the representatives violated their trust to the people. Personal ambitions and interests were paramount and the public welfare was ignored. Good laws were refused and bad ones enacted and many needed reforms denied. This condition of things was existing at the time of the enactment of the Oregon System.

The results of the adoption of this system has surprised its most sanguine supporters. Viewed from the character of the laws enacted by the people it is regarded by all classes as a success. Good laws have been passed and bad ones defeated. Many good laws desired by the public were refused by the legislature, but they were adopted through the initiative. A leading daily paper of the city, speaking of this fact, says:

"In Oregon, for example, the people clamored for a direct primary law, and a legislature refused to pass it. At the next election under the initiative the people passed it by a vote of 56,205 for and 16,354 against. The people 'comprehend' what they wanted, and, with the initiative, got it, after a legislature had refused it.

The legislature refused to pass a local option law for cities, and the people through the initiative passed a state wide law, with 43,316 for and 40,198 against.

The people asked for a gross earnings tax on certain corporations, and the legislature refused to pass the law. At the next election, the people passed it with the initiative, casting 70,872 for it, and only 6360 against it. Did the representative legislature represent, and if so, whom?

The legislature beat a corrupt practices bill, and at the next election by use of the initiative, the people passed it. The vote for was 52,042, and against, 31,301.

The people do 'comprehend.' "

The introduction of the system had a very salutary effect upon men in public life. Instead of the legislature refusing to organize in order to retain a certain United States Senator in the Senate, the individual members of the legislature obeyed their personal pledges to support for United States Senator the candidate approved by the people, under Statement No. 1, although as a matter of law, they were not required to do so, but could have elected whoever they chose. They did this and elected, a democrat to the United States Senate, although the legislature was overwhelmingly republican. This change in the moral fiber of the individual members of the legislature, was brought about by the active part the people were taking in making laws to compel representatives to regard their wishes.

In addition to the progress in things political, due to the system, there was a corresponding progress of the State in things material. Never has the State advanced as rapidly in population and wealth as it has since the adoption of these amendments. The growth of the City of Portland in the last seven years is phenomenal. The forebodings that were honestly entertained by the opponents of the system, have been dissipated and, instead of hasty and unwise legislation and the consequent retirement of capital from the state, the exact opposite has resulted, and capital has sought investment in Oregon to an extent never before known and the people have regained confidence in their political institutions and tranquility and prosperity have followed.

PLAINTIFF'S CONTENTIONS.

Plaintiff contends, (1) that the people of the State have no

power to authorize the voters of the City to amend their charter; (II) that by Section 1-a the voters of the City may tax without limit; (III) that the Willamette River, being a navigable stream, cannot be bridged nor bonds issued for such purpose, without acts of Congress and of the Legislature; (IV) that Article IV. Section 1-a and Article XI. Section 2, establishes independent sovereignties within the state; and (V) that Article IV. Section 1 and Section 1-a (initiative and referendum amendments) are void as being unrepugnant (i. e. conflicts with Article IV. Section 4 of the United States Constitution).

DEFENDANT'S CONTENTIONS.

The defendants contend as to plaintiff's FIRST position, that (1) the people have such power; (2) that it is not a federal question.

Defendants contend as to plaintiff's SECOND position, (1) that a tax limit is discretionary with the voters; (2) that the question is not in issue; (3) that it is not a federal question.

Defendants contend as to plaintiff's THIRD position, (1) that the Willamette River is wholly within the State of Oregon; (2) that the War Department confirmed the bridge plans; (3) that Congress passed a curative act; (4) that plaintiff cannot raise the question; (5) that it is not a federal question; (6) that Section 118½ is sufficient authority; (7) that Chapter 6 Laws 1911 of Oregon cures the defect, if any; (8) that the police power of the city is sufficient authority to construct the bridge.

Defendants contend as to plaintiff's FOURTH position, (1) that the people of the city have the power of local self govern-

ment; (2) that Article IV. Section 1-a and Article XI. Section 2 contemplates purely local matters; (3) that Article XI. Section 2 is not involved in this suit; (4) that it is not a federal question.

Defendants contend as to plaintiff's FIFTH position, (1) that the question is political; (2) that legislative powers are not involved in this suit; (3) that a representative form of government is not essential to a republican form; (4) that Chapter 6 Laws of Oregon 1911 cures the defect, if any; (5) that direct legislation is not unrepresentative.

POWER OF THE PEOPLE TO DELEGATE POWER TO MUNICIPALITIES.

The contention of the plaintiff that the people of the state have no power to delegate to the voters of the city the right to amend their charter, is untenable. The power of local self government is a power secured to the people of the states by all their state constitutions.

Article I. Sec. 1 Constitution of Oregon.

10th Amendment Const. United States.

Cooley of Const. Lim. 7th Ed. pp. 68-69.

Local self government is eminently just. In matters of purely local concern, there is no reason why the representatives of other parts of the state should be permitted to take part in enacting the law of the municipality or amending its charter. In so far as the representatives from other parts of the state who have no interest in the affairs of the municipality, are permitted to interfere therewith, to that extent the principle of local self government is destroyed. It is just as

tyrannical to have representatives from other parts of the state impose unjust rules, regulations or laws upon the municipality, as it is to have such regulations imposed by an entirely foreign government. Therefore, the people of Oregon have wisely determined that, as to purely local, special or municipal legislation, the people of the municipality shall have entire control. Again, this question has been determined by the Supreme Court of the State of Oregon in this very suit, and it is not a federal question and is not properly for the consideration of this Court.

Kiernan vs. Portland, 111 Pac. (Ore.) 379; Rehearing
112 Pac. 402.

Kiernan vs. Portland, and Ladd & Tilton Bank ———
Fed. ———.

THE TAX LIMIT OF MUNICIPALITIES.

The plaintiff contends that Article IV. Section 1-a of the Oregon Constitution violates the Fourteenth Amendment of the Constitution of the United States. This contention is made because, under Article IV. Section 1-a of the Oregon Constitution, the people of the City may levy such a tax for municipal purposes as in their good judgment is necessary. Plaintiff contends this is tyranny and takes away his rights and is not due process of law, and that the people of the City might levy a very large and unreasonable tax. Of course, this is a purely a legislative question for the people of the City. The courts cannot say how high or how low a tax limit ought to be. That is a matter for the legislature, if it were a state tax; but, if it be a municipal tax, it must necessarily be for the voters of the municipality who have to pay the tax. In any event, it is not a judicial question. But, however this may be, no such

question is involved in this suit. It has not been alleged nor proved that there is any tax levy in regard to the matters involved in this suit or how much such levy is or will be. Again, this, in no event, can be a federal question.

NAVIGABLE RIVERS IN MUNICIPALITIES.

The plaintiff contends, that before bonds can be issued for the construction of a bridge across a navigable river, there must be an act of Congress and an act of the Legislature authorizing such construction. The answer to this contention is, that no congressional act is necessary where the river is wholly within the State, as is the situation here; and further, that no congressional act is necessary other than the general act authorizing the War Department to confirm and approve plans for the bridge. Such approval and confirmation was obtained as to this bridge. But, if there were anything in plaintiff's objections, it has been obviated by a congressional act specially approving and confirming the construction of this bridge. (See Act of Congress heretofore set out). Again the question is one that plaintiff cannot raise, it being a matter for the United States government only. If the United States government does not object to the construction of the bridge, it is none of plaintiff's concern.

Cudingner vs. City of Saganaw, 132 Mich. 395; 405.

Portland vs. Montgomery, 38 Ore. 215; 222.

190 U. S. (same case) 89.

Esanaba Co. vs. Chicago, 107 U. S. 678; 689.

Fort Plain Bridge Co. vs. Smith, 30 N. Y. 44.

Rowe vs. Strong, 107 N. Y. 350; 360.

Doolittle vs. Supervisors of Broome Co., 18 N. Y. 155,
157; 163.

The contention made by plaintiff that there is no legislative act authorizing the construction of the bridge, which, it is claimed, is necessary because the river is navigable, is not a federal question. That matter was determined by the Supreme Court of the State of Oregon which is the court of last resort for such question. Again, Article IV Section 1-a gave the voters of the city power to authorize the construction of the bridge without an act of the legislature and, even if such Article IV Section 1-a did not give such power, then Chapter 6 Laws of Oregon 1911 supplied such authority; and, if this was not sufficient, then the City of Portland under its police power (Portland Charter, Sec. 73 subdivision 1) had ample authority, under the extreme public necessity apparent in this suit, to construct the bridge to subserve the welfare of the public.

SOVEREIGN CITIES.

The plaintiff claims that Article IV Section 1-a and Article XI Section 2 of the Constitution of the State of Oregon enfranchises the municipalities of the State from all state control, and that such amendment permits the cities of the state to become independent of both the people and of the legislature of the State. This contention is incorrect. Such amendments merely makes more definite and certain the power of local self government and they have been construed several times by the Supreme Court of the State of Oregon to not release the municipalities of the State from state control as to matters of general concern. That is, where the matter is a matter that concerns all the municipalities of the State or concerns the people of the entire State, both the legislature and the people of the State have full and ample power to make laws which

directly control such municipalities. Judge Bean of the Circuit Court of the United States for the District of Oregon, rendered the following opinion against this same plaintiff:

"Suit by a resident tax-payer of the City of Portland to enjoin the City and its officers from issuing and disposing of bonds to raise funds for the construction of a bridge over the Willamette River, as authorized by section 118½ of the Charter adopted by the people of the municipality under the initiative powers vested in them by Amendment to Constitution of the State June, 1906.

The jurisdiction of this Court is sought to be invoked on the ground:

First, that the general initiative and referendum plan as embodied in the State Constitution is destructive of republican form of government and obnoxious to the provisions of Article 4, Section 4 of the Federal Constitution.

Second, that the Amendment of June 4, 1906, forbidding the creation by the legislative assembly of corporations by special laws, prohibiting it from enacting, amending or repealing any Charter or Act of Incorporation for any municipality, city or town, and granting to the people of such organization the power to enact and amend their municipal Charter, is a practical abdication of the sovereign power of the State over such localities and a virtual creation of a State within a State without the consent of Congress contrary to the provisions of Section 3, Article 4 of the Federal Constitution.

My views on the first question will be found in *Kadlerly v. City of Portland*, 44 Ore. 118, and *Oregon v. Pacific States T. & T. Co.*, 53 Ore., 162, and need not be further elaborated.

The second question depends upon the construction and effect of the Constitutional Amendment of 1906. It has

been construed by the Supreme Court of the State in *Straw v. Harris*, 54 Ore., 424, and *City of McMinnville v. Howenstine*, 109 Pac. 81, and in the recent case of *Kiernan v. The City of Portland*. As so construed, and especially in the opinion on rehearing in the latter case, it does not deprive the legislative power of the sovereign right to amend, repeal or even abolish, or to otherwise legislate concerning municipal corporations, and their inhabitants, provided it is done by general laws and is therefore not repugnant to the provisions of the Constitution invoked.

It is settled law that the Federal Courts in considering the validity and effect of a State Statute or Constitution will accept the construction placed thereon by the highest Court of the State, and they will not disregard such interpretation and adopt a different construction which will make it repugnant to the Federal Constitution. *Louisiana v. Pilsbury*, 105 U. S. 278; *C. M. & St. P. v. Minnesota*, 134 U. S. 418; *Mo., Kan. & Tex. v. McCann*, 174 U. S. 580; *Tullis v. Lake Erie & Western Ry.*, 175 U. S. 348; *Louisville & Nashville v. Eubank*, 184 U. S. 27; *Lapp v. Ritter*, 88 Fed. 108.

The application of this principle determines the case. The preliminary injunction will be denied, and the demurrer to the complaint sustained."

Kiernan vs. Portland et al., — Fed. —.

Straw vs. Harris, 54 Ore. 424; 430-431.

Bonner vs. Belsterling, 137 S. W. (Tex.) 1155.

Walker vs. City of Spokane, 113 Pac. (Wash.) 775.

Kaddery vs. Portland, 44 Ore. 118; 144-145.

Hartig vs. City of Seattle, 102 Pac. (Wash.) 408-409.

In Re Pfahler (Calif.) 88 Pac. 270; 272.

St. Louis vs. N. W. T. Co., 149 U. S. 465.

But the construction of Article XI Section 2 of the constitution is not involved in this suit, because, if it should be held that such section is void, nevertheless, there is ample power under Article IV Section 1-a for amending the Charter, and again, this being a matter of purely internal regulation, it is not a federal question. The claim, because the cities of the state are granted definite and specific powers of local self-government, that such grant thereby permits or establishes such cities as sovereign independent states, is, to the minds of counsel for the defendants, rather far-fetched.

THE OREGON SYSTEM IS REPUBLICAN.

The *main contention* of the plaintiff and, in fact the only federal question, is, has Oregon under its initiative and referendum amendments a republican form of government, such as is required by the guarantee in Article IV Section 4 of the Federal Constitution. The consideration of this question divides itself into five parts: (1) Is it a political or judicial question? (2) Does the issues in this suit involve any question as to the limitation upon the powers of the legislature? (3) Is a representative system an essential characteristic of a republican form of government? (4) Has this question not been settled by Chapter 6 Laws 1911 of the State of Oregon? (5) Is direct legislation unrepresentative? The last question will be considered from the view point; (a) of definition, (b) federal debates, (c) court decisions, (d) development in the states, (e) as to long usage and dependent property rights.

Is this question political or judicial? The admission of a State into the Union involves congressional discretion. It requires an Act of Congress. Suppose that the issue was prop-

erly raised and presented to this Court as to whether or not a state seeking admission into the Union had a republican form of government and this Court should find that it had such government; but that Congress, on the contrary, should determine that such state did not have a republican form of government and therefore refused to admit it into the Union, where is the power of this Court to compel Congress to pass a law admitting such state into the Union?

On the contrary, suppose Congress should determine that a state had a republican form of government and admitted the state, as Oklahoma for instance, and this Court should determine that it did not have such republican form. What remedy would this Court have? Could it expel such state from the Union? Could it compel such state to change its form of government? Could it compel the electors of the state to repeal their constitution? What would this Court do, if the electors of the state refused so to do? The only thing that could be done under such circumstances, would be for the Federal Government to suppress such state government with the military and naval powers of the United States. This would involve the highest degree of executive and congressional discretion, uncontrollable by any decision of this Court. Thus the question really is a political question and a matter for Congress. If Congress recognizes the state government as a government, such recognition is a final determination that such government is republican from which there is no appeal. The courts say:

"Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as polit-

ical in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion, and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."

Luther v. Borden, et al., 7 How. (U. S.) 1, 42.

Texas v. White, 7 Wallace (U. S.) 700-730.

"But it is said that the Fourteenth Amendment must be read with section 4 of article IV of the Constitution, providing that: 'The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.' It is argued that when the State of Kentucky entered the Union, the people, 'surrendered their right of forcible revolution in State affairs,' and re-

ceived in lieu thereof a distinct pledge to the people of the State of the guarantee of a republican form of government, and of protection against invasion, and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the general assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guarantee, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government. And yet the writ before us was granted under section 709 of the Revised Statutes to revise the judgment of the State court on the ground that a constitutional right was decided against by that court.

"It was long ago settled that the enforcement of this guarantee belonged to the political department. *Luther v. Borden*, 7 How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it; and also that as the Supreme Court of Rhode Island holding constitutional authority not in dispute, had decided the point, the well-settled rule applied that the courts of the United States adopt and follow the decisions of the State courts on questions which concern merely the Constitution and laws of the State."

Taylor and Marshall v. Beckham, 178 U. S. 548.

Hopkins v. City of Duluth, 81 Minn. 189 (83 N. W. 536).

In re Duncan, 139 U. S. 449.

Leeper v. State of Texas, 139 U. S. 462-467.

"Whether the people of Virginia have duly adopted the

constitution 1902 is a political question, and where it has been recognized as valid by the executive and legislative departments and accepted by the people, legality of its adoption cannot be brought in question by a federal court."

McConaughey vs. Sec. of State, 106 Minn. 392 (119 N. W. 408).

Brickbome vs. Brooks, 165 Fed. 534.

The question as to whether or not the people have the power through the initiative and referendum to enact laws, of the character formerly enacted by the legislature, is not really involved in this suit. The defendants' contention is, (2) that the parts of Article IV Section 1, and Section 1-a, as to enacting laws by the people of a character formerly enacted by the legislature, can easily be separated from the remainder of the amendments; and, when so separated, such parts give complete sense and amount to no more than providing for a different method, than formerly obtained, of amending the constitution of the State. When such segregation is made, Article IV Section 1, and Section 1-a, reads as follows:

"ARTICLE IV SECTION 1."

Adopted June 2, 1903.

"Section 1. The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly. The power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of

state not less than four months before the election at which they are to be voted upon. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative shall be filed with the secretary of state, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided for."

"ARTICLE IV, SECTION 1-a."

Adopted June 4, 1906.

"Section 1-a. The referendum may be demanded by the people against one or more items, sections or parts of any act of legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections or parts of an act shall not delay the remainder of that act from becoming operative. The initiative powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all *local, special and municipal* legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative powers as to their municipal legislation. Not more than fifteen per cent of the legal voters may be required to propose any measure, by the initiative, in any city or town."

The separation here made is entirely feasible. In order to sustain plaintiff's contention, the Court must find, in this suit,

that the *mere changing of the methods* of amending the state constitution renders the state government unrepresentative. But it is, nevertheless, representative for the people to change the method of amending their constitution.

St. Louis vs. W. U. T. Co. 149 U. S. 465.

McMinnville vs. Howenstine, 109 Pac. (Ore.) 81; 85.

Kansas vs. Marsh, 140 Mo. 458; 467.

It is contended by plaintiff, in substance, that a representative system of government is an essential characteristic of the republican form. The defendants' answer is, (3) that a representative form is not an essential of the republican form, but, in fact, the representative form, from its very nature, tends toward a monarchy. The initiative and referendum method is distinguished from the representative method in that it is a *direct plan* of legislation. If plaintiff's position be correct then, enacting laws by *representative bodies* is an essential characteristic of a republican form of government while enacting laws by direct vote is not. Hence it would be supposed that monarchies, oligarchies or aristocracies would enact their laws by a direct vote and that republics would enact their laws by representative bodies. Thus Russia, Turkey, and the Chinese Empire would be republican forms of government, while the Swiss Canton might be a monarchical form of government. It would also be supposed that, if the representative system of enacting laws was an essential and distinctive characteristic of a republican form of government, only republics would have such system. But, on the contrary, all constitutional monarchies have a representative system and a representative body that takes part in the enacting of the laws. This is true of England, Germany, Austria, Italy, the Scandinavian monarchies,

the Japanese reform government and, even of Russia, in a limited sense. Thus enacting laws by a representative body is not an essential characteristic of a republic at all, for it is found as often with monarchies as with republics.

An analysis of the system of representation shows that such system is, in fact, the basis of the right of the absolute monarch. In proportion as the government takes on the representative form as against the direct action of the voter in making laws, in that proportion does such government tend toward monarchy and away from a republic or democracy. The king is the representative of his people and he acts for them. Such is the view of all the nations of the world in dealing with a government controlled by such monarch. He is taken to speak for his people and to represent them and to act for them. Thus the greatest representative in the world, is an absolute king.

By a process of elimination a large body of representatives could be reduced to one; this one would still be a representative. If the executive and judicial functions were also imposed upon this one, he would still be a representative and at the same time he would become and be an absolute monarch.

If this court should hold that an act of the legislature is necessary to have authorized the issuance of bonds and the construction of this bridge, then (4) the court's attention is called to *Chapter 6 Laws of Oregon 1911*. This Chapter grants full authority for the construction of the bridge and the sale of bonds for that purpose. This law is set out in full in the Statement of Facts. It seems to counsel for the defendants that this law is determinative of the question as to the present

issuance of an injunction. The bridge is now partially completed and more than half of the bonds sold and in circulation. It is not intended by counsel for the city to claim, that if the court should hold that a legislative act is necessary, that the city might not be compelled to pay the costs in this suit. This is true because such curative act was passed after the initiation of the present litigation. But, it is contended, as to the stopping of the further issuance of bonds and the completion of the bridge, that such law, if the city have no power by the initiative, gave such power.

Direct legislation is republican and (5) does not violate Article IV Section 4 of the Federal Constitution. This truth is apparent when we consider, (a) the *definition of a republic*, (b) the *debates* upon the adoption of the Federal Constitution, (c) the *decisions* of the courts, (d) the *parental connection of direction legislation* with the growth of self government, (e) the *long use of direct legislation*, without question, by the people of the different states where such legislation has become the basis of large property rights. The *definitions of a republic* are as follows: :

"A government in which the executive power is vested in a person or persons chosen directly or indirectly by a body of citizens entitled to vote. It is distinguished from a monarchy on the one hand, and generally from a pure democracy on the other. In the latter case, the mass of citizens meet and choose the executive, as is still the case in certain Swiss cantons. In a republic, the executive is as in the United States, or by a national assembly, as in France."

The Century Dictionary.

"Republican government" "A government of and by

the people, as distinguished from a monarchical or aristocratic government."

Rapalje & Lawrence's Law Dictionary.

"Republic:" "A Constitution in which the supreme power in the State is vested not in hereditary rulers but in the citizens themselves. According to the Constitution of the nation a republic may, therefore, vary from the proudest aristocracy to the most absolute democracy."

Twentieth Century Encyclopedia and Dictionary.

"Republic:" "A word signifying a State in which the people are the source of power."

Encyclopedia Americana (Edition 1903-04).

"As a citizen, I know the government of that State (Ga.) to be republican, and my short definition of such a government is one constructed on this principle; that the supreme power resides in the body of the people."

Chisholm vs. Georgia, 2 Dallas (U. S.) 419.

"A republic is that form of government in which the administration of affairs is open to all the citizens."

2 Bouvier Law Dictionary 577.

"A republic is a government for the protection of the citizens against the exercise of all unjust power."

34 Cyc. pp. 16-22.

"In a republic all the citizens of such, are equal, and no citizen can rightfully exercise any authority over another, but in virtue of a power constitutionally given by the whole community, and such authority, when exercised, is in effect an act of the whole community which form such republic. In such government, therefore, the sovereignty resides in a great body of the people, but it resides in them not as so many distinct individuals but in their political capacity only."

24 American and English Enc. of Law, 598.

In (b) *the debates* at the time of the adoption of the constitution, the following statements were made in regard to a republican form of government.

"A government which derives all of its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior."

Federalis,, 302.

"What, then, of the distinctive characters of the republican form? Were an answer to this question to be sought not by recurring to principles but in the application of the term by political writers to the Constitutions of different States, no satisfactory one would ever be found. x x x

And then, if we resort for a criterion to the different principles on which different forms of government are established we may define a republic to be, or may, at least, bestow that name on a government which derives all its powers directly or indirectly from the great body of the people and is administered by persons holding their offices during pleasure for a limited period or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable portion or a favored class of it. x x x It is sufficient for such a government that the persons administering it be appointed either directly or indirectly by the people and that they hold their appointments by either of the tenures just specified."

The Federalist, paper No. 39.

"That when individuals enter into government they each have a right to an equal voice in its first formation, and afterwards have each a right to an equal vote in

every matter which relates to their government. That if it could be done conveniently they have a right to exercise it in person—when it cannot be done in person, but for convenience, representatives are appointed to act for them.”

Luther Martin.

“Representation is made necessary only because it is impossible for the people to act collectively.” (5 Elliott’s Debates, p. 160.)

James Wilson.

“The majority having, as has been shown upon men’s first uniting in society, the whole power of the community in them, may employ all that power in making laws for the community from time to time and executing those laws by officers of their own appointing, and then the form of government is a perfect democracy.” (Locke on Civ. Govt., Chap. 10, Par. 321.)

“That in which the body or only a part of the people are possessed of the supreme power. A monarchy, that in which a single person governs by fixed and established laws. A despotic government, that in which a single person without law and without rule directs everything by his own will and caprice. This author has not distinguished a republican government from a monarchy by the extent of its boundaries but by the nature of its principles.”

3d Elliott’s Debates, p. 34.

“We prefer this system to any monarchy, as we are convinced that it has a greater tendency to secure our liberty and promote our happiness. We admire it because we think it a well regulated democracy.”

3 Elliott’s Debates, p. 322.

“In a confederacy founded on republican principles and

composed of republican members, the superintending government had clearly the best authority to defend the system against aristocratic and monarchical innovations."

Madison in *The Federalist*.

"As long, therefore, as the existing republican forms are continued by the States they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so."

Fed. (Ford Ed.) No. 43, p. 287.

The (c) *decisions of the courts* and text book writers sustain the contention that direct legislation is republican. They say:

"The sovereign power of the State resides in the people."

Cooley on Constitutional Limitations, 7th Ed. p. 3.

"The will of the people is the final law."

Cooley on Cons. Limitations, 7th Ed. p. 6.

"All power is inherent in the people and they have at all times a right to alter, reform or abolish government."

Art. I Sec. I, Constitution of Oregon.

"Powers not delegated to the United States by the Constitution nor prohibited to the States are reserved to the states respectively or to the people."

10th Amendment to the Constitution of the U. S.

"The constitution grants no rights to the people but is a creature of their power and the instrument of their convenience."

Cooley on Constitutional Limitations, 7th Ed. pp. 68-69.

"As a citizen. I know the government of that state to be republican, and my short definition of such a govern-

ment is one constructed on this principle; that the supreme power resides in the body of the people."

Chisholm vs. Georgia, 2 Dallas (U. S.) 419.

"For the will of the people, as declared in the Constitution, is the final Law; and the will of the legislature is law only when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen."

Cooley's Constitutional Limitations, p. 6.

"As much larger powers were vested by this instrument in the general government than had ever been exercised in this country either the Crown, the Parliament, or the Revolutionary Congress, and larger than those conceded to the Congress under the Articles of Confederation, the *assent of the people of the several States was essential to its acceptance.*"

Cooley's Constitutional Limitations, p. 9.

"The purpose of these is to protect the Union founded on republican principles, and composed entirely of republican members, against aristocratic and monarchical innovations."

Cooley's Constitutional Limitations, p. 45.

"The general principles of a republican form of government are:

That all free men when they form a social compact are equal.

That no man is entitled to exclusive public emoluments or privileges except in consideration of public service.

That the government has no arbitrary power over the lives and property of a citizen.

That all power is inherent in the people and founded on their authority.

Instituted for their peace, safety, happiness, security and the protection of property.

(That they have a right to alter, reform or abolish their government in such manner as they think proper.

That all elections shall be free and equal.

That there is no power of suspending the laws except by the law making body.

That standing armies are not to be maintained in time of peace.

That representation shall be in proportion to the population.

That the people shall have a right to assemble and petition for a redress of grievances.

The right to hold and own property and the right to the free exercise and enjoyment of religion.

The right to freely speak and write his sentiments.

The right to bear arms in defense of himself and State.

The right to be secure in his person, house, papers and effects against unreasonable searches in time of peace.

The right to an impartial trial by jury.

Right to not be deprived of life, liberty and property without due process of law.

Right that private property shall not be taken for public use without compensation."

Cooley's Constitutional Limitations, pp. 65-67.

"In considering State constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. 'What is a Consti-

tution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; *it grants no rights to the people, but is the creature of their power, the instrument of their convenience.* Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought.' x x x A written constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition."

Cooley's Constitutional Limitations, pp. 68-69.

"Indeed, Justice Story, in his work on the Constitution, Vol. 1 Sec. 525, referring to the distribution of the three great powers of government, legislative, executive, and judicial, says: 'But, when we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principles of a free Constitution The slightest examination of the British

Constitution will at once convince us that the legislative, executive, and judiciary departments are by no means totally distinct and separate from each other.' See also opinion of Harlan, J. in *Dreyer v. Illinois*, 187 U. S. 71, 47 L. Ed. 79, 23 Sup. Ct. Rep. 28."

Trustees of Saratoga Springs v. Saratoga Gas, E. L. & Co., 191 N. Y. 123; 83 N. E. 693; 18 L. R. A. new series, 718.

"Nor do we think the amendment void because in conflict with the Constitution of the United States, Article IV, Sec. 4, guarantying to every State a republican form of government. The purpose of this provision of the constitution is to protect the people of the several States against aristocratic and monarchical invasions, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government: *Cooley, Const. Lim.* (7 ed.) 45; 2 *Story, Const.* (5 ed.) Sec. 1815. But it does not forbid them from amending or changing their constitution in any way they may see fit, so long as none of these results is accomplished. No particular style of government is designated in the constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is 'a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.' *The Federalist*, 302. And in discussing the section of the Constitution of the United States now under consideration, he says: 'But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing re-

publican forms are continued by the States, they are guaranteed by the federal constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican constitutions': The Federalist, 342. Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place. The government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people."

Kadderly vs. Portland, 44 Ore. 118; 144-145.
From syllabus:

"The right to a republican form of government, guaranteed by Const. U. S. Art. 4, Sec. 4, means only such a government as is under the control of the people, or a representative government, and applies only to a state government, and not to its minor governmental subdivisions, such as incorporated cities.

Walker vs. City of Spokane, 113 Pac. (Wash.) 775.

In the opinion of the case *In Re Pfahler* (Cal.), 88 Pac. 270, 272, 273, the court said:

"The latter objection may appropriately be first considered. Its sole foundation is Section 4 of Article 4 of the Constitution of the United States, which is as follows: 'The United States shall guarantee to every state in this Union a republican form of government, and shall protect

each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence.' The contention here is, necessarily, that any attempt by a state to provide for a direct exercise of legislative power by the people, instead of by representatives of the people elected or appointed for that purpose, is, even in purely local affairs, inconsistent with the republican form of government guaranteed by this provision, and ineffectual for any purpose; the theory being that such provisions requires a purely representative form of government not only in the state itself, but also in all its subdivisions, leaving no vestige of power of direct legislation in the people themselves. If we assume that this claim presents a judicial question rather than a political one to be determined by the Congress of the United States (see, however, *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581; *Taylor v. Benkham*, 178 U. S. 548, 20 Sup. Ct. 1009, 44 L. Ed. 1187), we are brought to a consideration of the question as to what was meant by this guaranty of a republican form of government. For all the purposes of this proceeding it is sufficient to hold, as we do, that it does not prohibit the direct exercise of legislative power by the people of subdivision of a state in strictly local affairs. In saying this, we do not wish to be understood as intimating that the people of a state may not reserve the supervisory control as to general state legislation afforded by the initiative and referendum, without violating this provision of the Federal Constitution. That they may do so has been decided by Supreme Court of Oregon in the case of *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, which appears to be the only case in which that question has been directly presented. See, also *Hopkins v. City of Duluth*, 81 Minn. 189, 83 N. W. 536. However this may be, it is clear that the direct participation of the electors of subdivisions of a state in

legislation as to local affairs was never intended to be prohibited by the framers of the Federal Constitution, or the states adopting the same, and that such power has been exercised by them, where not inconsistent with provisions of their state Constitution, in innumerable instances, from the institution of our government to the present day, without reference of any kind on the part of the federal government.

"The effect of the provisions of the Los Angeles charter, as amended, is to give the legislative power vested in the city to the council and mayor, subject to such control by the electors as is given them by the initiative and referendum provisions. The reserved power of the electors to directly enact such ordinances as the Council refuses to enact, as well as their power to effectually veto ordinances adopted by the Council, is made paramount to the power of the council and mayor, the council being without power to repeal or amend an ordinance so enacted, and the objection that under the initiative we have 'two equal, co-ordinate lawmaking bodies, the one absolutely independent of the other', is therefore without foundation."

"We know of no state in which the right of the Legislature to grant to the people of a local subdivision the power to directly discharge legislative functions in local matters is denied, except where the constitution of such state may reasonably be construed as forbidding such a grant, as may be held to have been the case in *Shumway v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107, a case relied on by petitioner. Our own Constitution certainly cannot be so construed. We entirely concur in what was said by the Chief Justice *ex parte Anderson*, 134 Cal. 69, 75; 66 Pac. 194; 86 Am. St. Rep. 236, where speaking of the constitutional grant to every county, city, etc., embraced in section II of article 11, he said: 'This grant

to the counties of the power of local legislation is, of course, a grant to the people of the respective counties. How they are to exercise the power, whether in their primary capacity by voting at the polls, as in the case of the adoption of a state Constitution or of amendments thereto, or by their chosen representatives in boards of supervisors, is purely a matter of legislative regulation; and I cannot see how it is possible, upon any recognized principle of constitutional construction, to deny to the Legislature the power to confer upon the qualified voters of the respective counties the right to make local laws which will be valid and effective within their territorial limits." This question, as already stated, was not determined by the majority of the court in that case. If the Legislature, in providing by general statute for the organization and government of municipalities, can grant such power to the people thereof, there can, of course, be no question that such power may be vested in the people of a city by the provisions of a freeholders' charter framed by the city, ratified by the electors thereof, and approved by the legislature, under section 8 of article 11 of the Constitution.

Much that is said in the briefs of counsel assailing the initiative amendment goes rather to the question of the policy of investing the electors of a municipality with such general power of local legislation than to the question of the validity of the law accomplishing this result. There may reasonably be differences of opinion as to whether the method devised will prove beneficial or not. However, the extent to which the electors of a municipality shall be permitted to directly discharge legislative functions in local affairs is purely a question of policy, with which the courts have nothing to do. It is our duty to uphold the charter provisions, if it be consistent with our federal and state Constitutions, and that it is we have no doubt.

"The provision referred to provides that 'the United States shall guarantee to every State a republican form of government, and protect them from invasion,' etc. 'The purpose of this guaranty was to protect a union founded upon republican principles against aristocratic and monarchical invasions. x x x It will be admitted, however, that this State cannot supplant its republican form of government by 'aristocratic and monarchical invasions,' upon principles inherent in the nature of the government, but it may change its constitution in any way consistent with its own fundamental law; and we are unable to see the force of the suggestion that the amendment of 1898 is not republican in form as well as in spirit. It is true that, by the submission of charters and amendments to municipalities in the manner provided for by the amendment, a change is effected; but it is a change that by every historical sanction, from the earliest times, is republican in form and essence. The Federal as well as the State government is representative in character, and the people do not directly vote upon the adoption of the laws by which they are governed. Yet it cannot be said that, if they were able to do so, a provision to effectuate that purpose would not be republican. x x x The test of republican or democratic government is the will of the people, expressed in majorities, under the proper forms of law. Every proposal for a change of government must of necessity be submitted, either directly or indirectly, through a designated origin, whether it be upon the motion of one or of more persons, upon the instance of an individual citizen or a number; but so long as the ultimatum of decision is left to the will of the people, at the ballot box, it is essentially republican, and the theoretical distinction urged by the learned counsel for the contestee practically amounts to no more than the argument that the change provided for is new and radical. It may turn out that the amendment is beneficial or otherwise, yet its

tendencies are clearly republican, and must be upheld by this court."

Hopkins vs. The City of Duluth, 81 Minn. 189, 83 N. W. 536.

"Whether the initiative and referendum amendment to the constitution is invalid, because repugnant to the provisions of the Constitution of the United States, was thoroughly argued to and considered by this court in Kadderly v. Portland, 44 Or. 118 (74 Pac. 710: 75 Pac. 222), and the views of the court as then and now entertained are indicated in the opinion filed in that case, and it is needless to re-state them at this time."

Oregon vs. Pacific States Tel. & Tel. Co., 53 Ore. 162; 166.

"By the adoption of the initiative and referendum into our constitution, the legislative department of the State is divided into two separate and distinct lawmaking bodies. There remains, however, as formerly, but one legislative department of the State. It operates, it is true, differently than before—one method by the enactment of laws directly, through that source of all legislative power, the people; and the other, as formerly, by their representatives—but the change thus wrought neither gives to nor takes from the legislative assembly the power to enact or repeal any law, except in such manner and to such extent as may therein be expressly stated. Nor do we understand that it was ever intended that it should do so. The powers thus reserved to the people merely took from the legislature the exclusive right to enact laws, at the same time leaving it a co-ordinate legislative body with them. This dual system of making and unmaking laws has become the settled policy of the State, and so recognized by decisions upon the subject. Kadderly v. Portland, 44 Or. 118 (74 Pac. 710: 75 Pac. 222); Oregon v. Pac. Sta. T. & T. Co., 53 Or. 162 (99 Pac. 427)."

Straw vs. Harris, 54 Ore. 424; 430-431.

"The initiative and referendum provisions, relating, not only to the affairs of the state, but also to counties and cities, are taken substantially from the Constitution of Oregon, and the Supreme Court of that state, in the case of Kadderly v. Portland, 44 Or. 119, 74 Pac. 720, 75 Pac. 222, has held that the same are not in conflict with section 4, art. 4, Const. U. S., guaranteeing to every state a republican form of government."

Ex Parte Wagner, 95 Pac. (Okl.) 435.

"So that, under the power of the Constitution subject to the limitation above mentioned, there can be no question of the right of the city to adopt and carry into effect the initiative and referendum plan of government; for it can scarcely be contended that this plan is inconsistent with a republican form of government, the central idea of which is a government by the people. Whether the expression of the will of the people be made directly by their own acts or through representatives chosen by them is not material."

Hartig vs. City of Seattle, 102 Pac. (Wash.) 408;
409.

In considering *direct legislation* (d) (e) as related to the development of our country it will be found, that it first appeared in the unit, or cell as it were, or out political system known as "the town." In these towns the voters took a direct part in establishing the rules, regulations and laws for the town. In small communities this system of government was practicable. Such system is exemplified by the "Russian Village System," the "Swiss Canton," the "Old English Wittengemote" and the "New England Town System." Such system is continued in local townships and small communities in all the

states at the present time. It is a well established method of legislation in all municipalities, such as school districts, townships, counties, cities and villages, when the question is of large local importance as where the issue of bonds for public improvement are involved.

If there had been no necessity for the combination of these local communities, it is likely that direct legislation would have been the only system of making laws such communities would have ever known. The necessity for protection compelled these local self-governing bodies to combine. When such combination took place, it then became necessary on account of the inability of all the voters of the different towns involved to meet together in one place to enact the laws which should control the combined towns. Thus it became necessary for the voters to chose some person or persons to represent them at the combined meeting. The representative idea developed, not because it was a superior method of legislation over that of a direct vote of the persons to be governed by the law enacted, but because there was no other way to enact the necessary laws for the combined communities. In other words, it was *merely an expedient* to meet the necessary condition existing at that time. These early towns were first combined into counties and controlled by "a county court" and later they were combined into provinces and later became states. The representative idea was continued in use in these larger combinations for the same reason that it had originated in the first place, namely, for the convenience of the voters.

Such representative idea was not confined to the New England States but grew up all over the world where the people were permitted any say in the government. It appeared in

England in very early times. The English Parliament is a representative body as much so as Congress of the United States. The same is true of the German Reichstag and the Scandinavian parliaments. All the nations of Europe, irrespective of whether their executive is elected or hereditary, have some form of representative government. The representative idea in these nations grew up for the same reasons that it grew up in this country.

Thus it is seen that the representative idea is of no value in enacting laws, outside of its value as an expedient to overcome the difficulty due to the inability of the individual voter to meet with other voters at a long distance from his home to enact the laws necessary to govern the state. Where a large territory is to be governed and the country is sparsely settled, without railroads and without telegraphic or telephonic communication and with very limited means of collecting or disseminating ideas except by word of mouth, a representative system is a necessity. But, as a scaffold while necessary in the construction of a building, becomes unnecessary and an eye sore after it is completed, so a representative system being a mere expedient made necessary by lack of rapid methods of communication and lack of means and ability to collect and disseminate news and by lack of a high educated intelligence, may, when all these things are supplied, become unnecessary and useless and even injurious.

The representative holds a trust position and he may be caused to violate his trust by party prejudice, friendship, personal interest or positive corruption. A just law cannot be enacted until all of these forces have been overcome. When such representatives enact unjust laws they raise a hatred in

the public mind for the injustice done, which feeling includes the law and the officers of the law, and breeds law-breakers. This is true because the injustice is perpetrated and perpetuated in *the forms of law*.

Such a condition does not exist in conjunction with a representative system where a direct plan is used. Such direct plan on account of the elimination of the influences operating upon the representative personally, is much superior to the representative system alone, unless such direct action tends to hasty and ill-considered legislation. But the time given between the initiation or the referendum of the law and the day of election tends largely to overcome this evil. Also, the actual delivery into the hands of the voter of copies of the law together with arguments for and against it, long before the time to vote, has made such action practically impossible. It has been demonstrated in Oregon by experience that voters have, with rare discrimination, passed good laws and defeated unwise ones.

Under our system of government the people are the sole source of political power. (Cooley on Const. Lim. 7th ed. pp. 3, 6; 65-69.) They are the supreme ultimate of things political. They can give and they can take away. They deposit certain power in the legislature, they can withdraw such power. To deny such right is to deny the right of the people to self government. Because, if the legislature when created becomes an absolute permanent body not changeable except in personnel, the creature has become greater than the power that created it. The legislature as an institution has become supreme. The people cannot control it. They may change its individual members but cannot change the institution. Then there is no self government; because self government contemplates that the

people may determine the manner and method, the means and kinds of institutions for their government. It will be found upon examination that in our system of government, the *representative idea* is *auxilliary*, while the *direct plan* is *fundamental*. This is clearly shown when we consider that the very foundation of the power that the legislature has, to-wit, the constitution of the state, is an instrument adopted by, and which has for its only sanction, the *direct vote of the people of the state*. Thus the very existence of a representative assembly itself, depends upon a direct vote of the people. If the direct action of the people in legislation is unrepresentative, then one of the results of such direct action, the constitution, is also unrepresentative. And, if the constitution of the state is unrepresentative, then it is illegal and void as contradicting Section 4 of Article IV of the Federal Constitution. If the constitution of the State is a nullity, then the legislature of the state, which has for its sole charter of existence such constitution, is without legal power. If the legislature has no legal existence then it is not a representative government nor any kind of a government, but simply an irresponsible body of men without legal sanction, whose acts bind no one. Thus Oregon, under such a theory, would have no government whatever and would have no way to make one. For the people cannot meet and form one, because it would have to be formed by a direct vote, which, if plaintiff's contention be correct, Article IV Section 4 of the Federal Constitution prohibits. There is no legal representative body because there is no authority of law or constitution authorizing its creation. The results of the contention of the plaintiff is, when reduced to its lowest terms, a condition of anarchy. A condition highly regarded by certain people but which the law abiding citizens of Oregon and of the whole country, do not regard as conducive to their happiness or welfare.

After having considered the theory of direct legislation and having found that it is a fundamental in our system of government, we will now consider the practical side of the question and determine what position *direct legislation has had in the growth and development of our governmental system and business affairs*. Direct legislation has by long continued usage become a fixed and permanent part of our state and municipal governments and has become the legal basis of large property rights. The constitutions of all of the states in recent years, as has been pointed out in the learned brief of the Attorney General and Bennett and Sinnott in the Pacific States Telephone Case, have been adopted by direct vote as have been all the amendments thereof. Such amendments have embraced all kinds of subjects, purely legislative law as well as organic acts. Some of the subjects embraced are public lands, homesteads, carriers, corporations, intoxicating liquors, elections, mines, lotteries and many other divers subjects.

Such amendments have authorized municipalities to regulate their internal affairs, to build buildings, to issue bonds, to construct public docks and to move county seats, etc. The validity of these different acts performed and property rights obtained, under such constitutions and amendments, have for their sole authority and sanction the direct vote of the people and the validity of direct legislation. Many states, seven or eight in number, have adopted the initiative and referendum amendments to their constitutions, and all manner of obligations have been incurred through and under such initiative and referendum provisions. All of these states and the municipalities thereof and of other states, have immense bond issues outstanding depending solely for their validity upon direct legislation. The city

of Portland alone has over four million dollars of outstanding bond issues which have for their sole warrant the sanction of initiative and referendum legislation.

Again, the results of a holding that direct legislation is un-republican is beyond computation. Such a holding would be equivalent to declaring that the government of the states depending upon such legislation, is alien or insurrectionary and should be suppressed. The value of bond issues based upon the validity of constitutions and amendments adopted by direct legislation, would be the same as the value of bond issues of the Southern Confederacy. A state government not recognizable by the Government of the United States as republican, is in no better situation, legally, than one of the Confederate States during the rebellion. Its acts would have no more binding effect. Its government would be illegal and void and subject to immediate suppression by the military and naval power of the United States. If the government itself is void, then all obligations thereof are invalid. It is as though such government had not existed, and its obligations in whosever hands they appeared would be worthless. How counsel for plaintiff can contend for such results and view them with equanimity is hard to understand. The suffering that would follow the declaration of this Court annulling these amendments and rendering void millions of dollars of state and municipal bond issues, is beyond comprehension. The idle talk about the "mob rule of the initiative," is not a circumstance to the condition that would follow such a decision.

In conclusion the counsel for the defendants desires to say that the Oregon system is in complete accord with our system of government, has given complete satisfactoin, has met the

evils from which the people of Oregon suffered prior to its adoption, and is a safeguard for the future welfare and prosperity of the State.

Dated, October 23, 1911.

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